Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WELLINGTON TRADE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of *Certiorari*
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

In 1974, Congress enacted the modern version of 28 U.S.C. § 455(a), to broaden and clarify the grounds for disqualification of federal judges at all levels of the judiciary. Since the modern § 455(a) was enacted, several key questions have remained unresolved.

This Petition raises the following single question:

1. When a panel of a federal Circuit Court of Appeals reverses a judgment on which a party prevailed, and that party learns after reversal that the impartiality of one of the panelists might reasonably be questioned and thereafter moves for *vacatur* of the panel's decision, may the Court of Appeals properly deny a motion to recall the mandate and for *vacatur* on "timeliness" grounds?

PARTIES AND RULE 29.6 STATEMENT

The caption reflects the parties to this proceeding. Wellington Trade, Inc., d/b/a "Containerhouse" was the plaintiff in the United States District Court for the Middle District of Florida and the appellee/cross-appellant in the original proceedings in the Eleventh Circuit. The United States was the defendant in the District Court and the appellant/cross-appellee in the original proceedings in the Eleventh Circuit.

After Wellington Trade learned of the circumstances supporting the disqualification of an Eleventh Circuit judge who sat on the panel in this case, Wellington Trade became the petitioner moving for *vacatur* in the Eleventh Circuit and the United States became the respondent.

Pursuant to Supreme Court Rule 29.6, Wellington Trade, Inc. affirms that it is a private corporation, incorporated in the state of Florida, which has as its sole stockholder Mr. Thomas W. Sikes. Wellington Trade, Inc. has no parent corporation and is not otherwise owned in any part by another corporation.

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OPINIONS BELOW

The Petitioner in this case, Wellington Trade, Inc., d/b/a "Containerhouse," was the prevailing plaintiff in an action under the Contract Disputes Act in the United States District Court for the Middle District of Florida. The United States appealed and, on appeal, the United States Court of Appeals for the Eleventh Circuit on September 7, 1994 issued an unpublished, twenty-six page opinion overturning the district court's decision. On February 1, 1995, the Eleventh Circuit denied Wellington Trade's motion for reconsideration and the United States' unopposed motion to publish its September 7, 1994 opinion. On June 26, 1995, this Court denied Wellington Trade's *certiorari* petition to review the merits of the Eleventh Circuit's September 7, 1994 opinion. This Court's June 26, 1995 Order denying *certiorari* is reported at 515 U.S. 1159.

After Wellington Trade learned of and was able to verify and distill the information supporting disqualification of a member of the Eleventh Circuit panel that issued an opinion in this case, Wellington Trade brought a motion for *vacatur* under 28 U.S.C. § 455 on February 2, 2001. A single judge of the Eleventh Circuit, who was a member of the original panel (and whose own disqualification was not an issue), Senior Circuit Judge Cox, denied Wellington Trade's motion as "untimely" on March 7, 2001. Senior Judge Cox's unpublished order is reproduced at Appendix 1. On April 16, 2001, Wellington Trade

brought a motion in the Eleventh Circuit for *en banc* rehearing. By order of June 6, 2001, a three-judge panel of the Eleventh Circuit, including Senior Judge Cox, denied Wellington Trade's motion for rehearing. The panel order denying rehearing is reproduced at Appendix 2.

STATEMENT OF JURISDICTION

After Wellington Trade learned the full measure of the circumstances supporting the disqualification of an Eleventh Circuit Judge, by Winter of 2000, it brought a *vacatur* motion in the Eleventh Circuit on February 2, 2001. A single judge of the Eleventh Circuit denied Wellington Trade's motion on March 7, 2001, and on June 6, 2001, a panel of the Eleventh Circuit denied Wellington Trade's rehearing motion.

This Petition is filed within 90 days of the Eleventh Circuit panel's June 6, 2001 order denying rehearing. This Petition is timely under Supreme Court Rule 13.1, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves provisions of the federal judicial disqualification statute, 28 U.S.C. § 455, which, in part, provide:

(a) Any justice, judge or magistrate [magistrate judge]

of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

. . .

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter of the controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

STATEMENT OF THE CASE

This proceeding arose when Petitioner, Wellington Trade, Inc., sued the United States government – complaining that the United States Navy breached a contract with Wellington Trade – and won. The government appealed, and a three-judge panel of the United States Court of Appeals for the Eleventh Circuit (hereafter "Eleventh Circuit") reversed. Unbeknownst to Wellington Trade, one of the panelists, District Judge Lacey Collier, sitting by designation, had ties with the Navy so close that a reasonable, objective

observer could not help but question Judge Collier's ability to be impartial in this case.

After its judgment was reversed, Wellington Trade's sole shareholder, Mr. Thomas Sikes, learned that at the same time Judge Collier was actively involved in overturning Wellington Trade's judgment against the Navy, he was concurrently courting the Navy to both commission a ship and to homeport one or more ships in his hometown.

Mr. Sikes thereupon undertook a more thorough investigation of Judge Collier's ties to the Navy. What he discovered, after extensive research conducted over approximately four years' time, convinced him that Judge Collier had been statutorily forbidden from participating in the appeal. Among other things, Mr. Sikes learned that Judge Collier – a retired Navy Lieutenant Commander with twenty years of active service – was a member of the "Admiral's Circle" of high-dollar donors to the commissioning cause, an active member of the commissioning committee, and, in that capacity, had socialized with and had been photographed along with then-Secretary of the Navy, John Dalton.

Mr. Sikes retained counsel, who promptly moved the Eleventh Circuit to recall its mandate in the case and to vacate the September 7, 1994 opinion reversing the judgment Wellington Trade had won against the Navy.

In response, Senior Judge Cox (a member of the original appellate panel) issued a terse, one-sentence order denying Wellington Trade's motion as "untimely filed." Three months later, a three-judge panel of the Eleventh Circuit denied rehearing – again without explanation or elaboration.

The Eleventh Circuit's summary treatment of Wellington Trade's *vacatur* motion is erroneous, conflicts with its own decisions and those of other Courts of Appeals, and is a troubling departure from what the public should reasonably expect of its federal judiciary. More than this, the Eleventh Circuit's behavior is indicative of a widespread practice among the Courts of Appeals, whereby disqualification motions – especially those dealing with appellate judges – are treated summarily, without providing guidance for the parties at hand or for future litigants.

Important questions like those presented here go unanswered because of a dearth of published opinions in cases involving challenges to the status of appellate court panelists.

For these reasons, this Court should exercise its supervisory authority and grant this Petition.

A. The Original Proceedings

This case originally arose from a dispute between Wellington Trade and the United States Navy

concerning a Navy contract to purchase used, ocean-going shipping containers during the Gulf War.

On January 30, 1991, the Navy's Military Sealift Command contracted with Wellington Trade to purchase 134 used, standard 20-foot shipping containers for transporting munitions, at a contract price of $489,416. The Wellington Trade-Navy contract was one of a series of similar emergency contracts whereby the Navy attempted to purchase 1000 new or used containers to carry follow-on munitions to what it expected to be a protracted ground war with Iraq.

Pursuant to the contract terms, Wellington Trade made available the 134 containers to government inspectors in Jacksonville, Florida, prior to delivering them empty to the Anniston Army Depot in Alabama. After Wellington Trade spent $39,794 in Jacksonville to make repairs requested by the government inspector there, all 134 containers passed the government's Jacksonville inspection for contract compliance. By February 12, 1991, Wellington Trade had delivered all 134 containers to Anniston. *See* Lodging at 55-57.

Both Wellington Trade and the Navy agreed that a handwritten, custom-negotiated contract provision required government inspection and government contract-compliance certification in Jacksonville, and that both were accomplished after Wellington Trade spent the $39,794 to make repairs there. However, the Navy further contended that boilerplate contract

language also authorized a second, "*de novo*," contract-compliance inspection at Anniston. *See* Lodging at 56.

The disagreement between Wellington Trade and the Navy arose when, on February 25, 1991, the Navy rejected the containers in Anniston as non-contract-compliant. By that time, it was readily apparent that the containers would not be needed because the war with Iraq was about to end quickly. *See, e.g.* Lodging at 4-5.

After negotiations between the parties failed, Wellington Trade sued the government under the Contract Disputes Act, alleging, *inter alia*, breach of contract. *See, e.g.* Lodging at 55-57. Based on the apparent maritime nature of the contract, and on joint stipulation of the parties, the case was tried in the United States District Court for the Middle District of Florida. On June 11, 1993, the District Court entered judgment for Wellington Trade in the amount of $322,239.04, which included partial compensation for Wellington Trade's expenditures, as well as pre-judgment interest. *Id.*

The government appealed the District Court's judgment to the Eleventh Circuit on August 10, 1993. Wellington Trade promptly cross-appealed, based on what it contends are two simple, well-settled principles of government contract interpretation. *Id.*, Lodging at 57.

On April 28, 1994, the Eleventh Circuit Clerk's office issued what it termed a "Revision 2" to what appears to be the court's oral argument Calendar No. 40 for that term. *See, e.g.* Lodging at 9, 100, 103. This was the first calendar Wellington Trade had ever received. It is apparent from this revision that the Wellington Trade case was added to and another case deleted from oral arguments Calendar No. 40, the calendar for a three-judge panel that included visiting United States District Court Judge Lacey Collier, from Pensacola, Florida.

After full briefing by the parties, the panel including Judge Collier heard oral arguments on May 23, 1994. On September 7, 1994, the panel issued a twenty-six page opinion in favor of the Navy, overturning the District Court's decision, which had awarded compensation to Wellington Trade under the "termination for convenience" cause of action. The panel opinion never once used the word "Navy," despite a record replete with references to the Navy contract. The opinion, which is not directly at issue before this Court, was issued in an unreported, *per curiam* fashion.

On February 1, 1995 the Eleventh Circuit denied without comment both Wellington Trade's rehearing petition and the government's unopposed motion to publish the September 7, 1994 opinion. *See* Lodging at 47.

Thereafter, Wellington Trade filed a *certiorari* petition with this Court, which the Court denied by order of June 26, 1995. *See Wellington Trade v. United States*, 515 U.S. 1159 (1995).

B. The *Vacatur* Motion and Proceedings.

Unbeknownst to Wellington Trade or its then-counsel, in the last week of April, 1994 – at about the same time this case was being assigned (or reassigned) to an Eleventh Circuit panel that included visiting District Judge Collier of Pensacola, Florida – highly pertinent news was breaking in Pensacola pertaining to the upcoming commissioning of a Navy ship, the *U.S.S. Mitscher*.

Of significance is that the Pensacola media was reporting the importance of the ship's commissioning to Pensacola. Likewise, it reported in West Florida, over 300 miles from the Jacksonville, Florida offices of Wellington Trade and its attorneys, the close relationship between members of the local "commissioning committee" and the Navy brass that authorized the commissioning in Pensacola, and the fact that Judge Collier was a key member of that committee which worked closely with the Navy to bring the commissioning to his hometown. *See, e.g.* Lodging at 6-8, 10-11. *See also* Lodging at 63 (discussing *Pensacola News Journal* articles and associated documentation).

After this Court denied *certiorari* in June of 1995, Wellington Trade engaged in an extended investigation of the events surrounding its contract with the Navy, as well as of the litigation which thereafter ensued. Gradually, Wellington Trade learned of a history of close, multi-faceted relations and a confluence of interests between Judge Collier and the Navy. These relationships culminated in his participation on the commissioning committee of the *U.S.S. Mitscher*, in Pensacola, Florida, which was first publicly announced in the local, West Florida media on April 25, 1994. *See, e.g.* Lodging at 1-3, 6-8, 10-48.

The ties between Judge Collier and the Navy uncovered by Wellington Trade included the following:

First, Judge Collier is a retired Navy officer, with twenty years of active duty service. *See* Lodging at 1-2. He also received substantially all of his post-secondary education at Navy expense, including two Bachelor of Arts degrees and a Masters degree, all of which Judge Collier earned while serving in the Navy, and *Juris Doctorate* degree, which he earned while drawing Navy retirement pay. *Id.*, Lodging at 3. While Judge Collier's former service alone may not be enough to disqualify him from hearing a case involving the Navy's interests, *see, e.g. Maier v. Orr*, 758 f.2d 1578 (Fed. Cir. 1985), it does help to illuminate his ongoing involvement with Navy-related activities.

Second, Judge Collier was an integral and active member of the *U.S.S. Mitscher* commissioning committee. On or about April 25 and 26, 1994, the same week as the Wellington Trade case was put on the oral arguments calendar of an Eleventh Circuit panel on which he participated, *see* Lodging at 63, Judge Collier was one of a small group of influential, pro-Navy activists inspiring the first rounds of profuse, continuing local publicity concerning the upcoming commissioning of the *U.S.S. Mitscher* in Pensacola. According to the official brochure put out by the *Mitscher* commissioning committee, the local publicity was a result of the concerted effort between the commissioning committee and the local newspaper, the *Pensacola News Journal*. As a result of these mutual efforts, the attendant publicity over a period of time "whipped everyone into a patriotic frenzy." *See* Lodging at 35.

The commissioning committee plainly acknowledged that there was an agenda. The committee considered the *Mitscher* commissioning "...a good chance to show off Pensacola to some important defense department decision-makers and a couple thousand visitors." *See* Lodging at 34-35. The chairman of the committee remarked that the commissioning would be "a chance to market ourselves to Washington and the rest of the world in a very positive way." *Id.*, Lodging at 6. An effort to persuade the Secretary of the Navy to homeport a ship at Pensacola's Allegheny Pier was plainly near the top of

the agenda. *See, e.g.* Lodging at 6-7, 25, 45-46. The *Pensacola News Journal* reported that the committee felt its work presented "a timely opportunity to position ourselves with the right people." *Id.*, Lodging at 6-7. Within the same article, the paper reported that "U.S. District Judge Lacey Collier" was a committee member. *Id.* For many months throughout 1994, concurrent with the Eleventh Circuit's consideration of Wellington Trade's case, Judge Collier's name and photograph frequently appeared in the commissioning publicity in a strongly pro-Navy context. *See, e.g.* Lodging at 7, 10, 13, 19-20, 32, 36-37.

Third, Wellington Trade learned that Judge Collier also had a financial stake in the success of the *Mitscher* commissioning. The commissioning committee gave the name "The Admiral's Circle" to a group of high-dollar donors to the cause. *See* Lodging at 14-20, 21, 36-37. According to the committee, this group of benefactors "put us over the top." *Id.*, Lodging at 36. Judge Collier was a notable member of that small group of high-dollar donors. *Id.*, Lodging at 13, 19, 37.

In fact, it later became apparent that Judge Collier's stature within "The Admiral's Circle" was extremely significant, as he was photographed during a commissioning reception standing immediately beside the captain of the *U.S.S. Mitscher* and then-Secretary of the Navy John Dalton. *See* Lodging at 36. Indeed, at every turn, former Navy Lieutenant Commander Collier

was photographed in public and at VIP receptions with the Secretary of the Navy and assorted Vice Admirals and Rear Admirals.

Having collected and condensed this and other information, and believing that a reasonable, disinterested lay observer would have serious doubts about Judge Collier's ability to preside objectively over a case involving Navy interests, Wellington Trade brought a motion for *vacatur* and for recall of the mandate in this case to the Eleventh Circuit on February 2, 2001. *See* Lodging at 49-76.

In its motion, brought under 28 U.S.C. § 455(a) and §§ 455(b)(1) and (b)(4), Wellington Trade argued that (1) Judge Collier heard this case while under an objectively disqualifying taint, *id.*, Lodging at 61-66, 89; (2) that Judge Collier's disqualification tainted the entire panel, *id.*, Lodging at 66-68, 86-89; and (3) that Wellington Trade's motion for *vacatur* was both timely, *see* Lodging at 69-71, 105-113, and the appropriate remedy, *id.*, Lodging at 71-74, 82-85.

On February 12, 2001, the government filed a three-page response in opposition to Wellington Trade's motion, arguing that Judge Collier was not, in fact disqualified, that even if he was, it was essentially harmless error, and that, in any event, recalling the mandate is an extraordinary step not warranted by the disqualification of an appellate judge, *see, e.g.* Lodging at 77-79.

Wellington Trade filed a response to the government's opposition on February 20, 2001, arguing that the government's suggestion that the availability of relief under 28 U.S.C. § 455 is somehow tied to the issuance of a mandate would strip the federal judiciary of the ability to ever correct even an obvious disqualification situation that did not surface until well after a case closed. Wellington Trade made clear in its response that the government's position simply flies in the face of this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). *See* Lodging at 81-90.

On March 7, 2001, Senior Judge Cox of the Eleventh Circuit issued a one-sentence Order with respect to the Wellington Trade motion, denying the motion as "untimely filed." *See* Appendix 1. Senior Judge Cox's Order contains no further elaboration or analysis.

On April 16, 2001, Wellington Trade filed a petition for *en banc* rehearing with the Eleventh Circuit. *See* Lodging at 91. Therein, Wellington Trade argued that Senior Judge Cox's categorical pronouncement that the motion was "untimely filed" squarely conflicts with this Court's *Liljeberg* decision, as well as the Eleventh Circuit's own decision in *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989). *Id.* Moreover, as Wellington Trade argued, Senior Judge Cox's Order denying Wellington Trade's motion as "untimely filed" would force parties essentially to forego their right to an

unbiased judge unless they are able to investigate and ferret out a judge's ties and activities before he or she hears a case. Such a result is highly contrary to 28 U.S.C. § 455, which puts the onus on the judge to disqualify himself or herself when appropriate.

Wellington Trade's motion for *en banc* rehearing was decided by a three-judge panel of the Eleventh Circuit that included Senior Judge Cox. On June 6, 2001, the panel issued a one-sentence order stating that Wellington Trade's motion "which is construed as a motion for reconsideration of [Judge Cox's] March 7, 2001 Order is denied." *See* Appendix 2. Like Senior Judge Cox's Order, the panel's Order contained no analysis or elaboration.

REASONS FOR GRANTING THE WRIT

This case raises several key, unresolved issues concerning federal judicial disqualification. First, the Eleventh Circuit apparently applied a categorical, *per se* standard, without written analysis, to determine that Wellington Trade's *vacatur* motion was "untimely filed." That decision appears to conflict with this Court's *Liljeberg* decision, which allowed a disqualification motion where the movant did not learn of the disqualifying circumstances until ten months after the decision in question. *See, e.g.* 486 U.S. at 869. This highlights important questions that *Liljeberg* did not expressly answer, such as: must a motion brought under 28 U.S.C. § 455(a) be brought within a specific

time? If so, how long is that time, and does it begin to run from the time the judge is assigned? From the time he or she issues a ruling? From the time the litigant(s) learn initial fragments of the disqualifying circumstances?

The Courts of Appeals have either not answered or are split on answers to these questions. Most have held that there is no *per se* timeliness requirement under § 455(a), but that there is a timeliness requirement whose adjudication must be based on a "reasonableness" test. Others, such as the Seventh Circuit, have held that § 455(a) contains no timeliness requirement.

Because this is an important area of law – both to the particular litigants in a given case and to the public's perception of the fair functioning of the judiciary – this Court should exercise its supervisory function, grant this Petition, and clarify the timeliness aspects of § 455(a).

Significantly, the fact that this case involves the disqualification of a federal appellate judge makes the case even more compelling because, unlike in the trial setting, parties in the appellate setting do not know the identity of the judges who will hear their appeal until shortly before the appellate hearing. Consequently, if the appellate judge does not disclose potentially disqualifying facts, *sua sponte*, there may not (realistically) be time for the party to undertake the

requisite investigation.

I. The Question of "Timeliness" Under 28 U.S.C. § 455(a) Is An Important Issue This Court Should Resolve.

In 1974, Congress enacted the current version of 28 U.S.C. § 455(a). Congress' intent was to "broaden and clarify the grounds for disqualification," *see, e.g.* 119 Cong. Rec. 33029 (1973), and to implement an "objective standard" for judging the disqualification of federal judges. *See, e.g. Liteky v. United States*, 510 U.S. 540, 548 (1994). *See also* H.R. Rep. No. 93-1453 at 5 (1973)(objective standard designed to "promote public confidence in the impartiality of the judicial process"). However, unless the most basic procedural aspects of the law, such as the timeliness of motions brought under it, are clarified, there is a danger that courts – such as the Eleventh Circuit in this case – will apply the law in a manner that vitiates both Congress' intent and the practical effect of the disqualification statute.

This Court has spoken on the issue of judicial disqualification on several occasions. As the Court expressly noted in one of its key decisions under § 455(a), the public is "often all too willing to indulge suspicions and doubts concerning the integrity of judges," *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864-65 (1988). Thus the mandates of 28 U.S.C. § 455 must be strictly adhered to in order to

protect "the public's confidence in the judicial process." *Id.*, 486 U.S. at 864. Moreover, the Court has expressed its view, with respect to judicial disqualification generally, that a litigant's right to a decision-maker who is both actually and apparently unbiased is one which "has constitutional dimensions." *See, e.g. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). *Accord Liljeberg*, 486 U.S. at 865, n. 12.

Accordingly, the Court has clearly indicated that questions concerning the disqualification of judges, generally, must reside at or very near the apex of important questions within our federal system, and has likewise indicated that the same holds true for questions about the federal disqualification statute, 28 U.S.C. § 455.

In this case, Wellington Trade brought its *vacatur* motion under 28 U.S.C. § 455. Wellington Trade argued that because of his ongoing ties with the Navy and his vigorous, high-profile participation in activities with the Navy to benefit both the Navy and his hometown, visiting District Judge Collier was disqualified from sitting on the Eleventh Circuit panel that adjudicated the case in question. *See, e.g.* Lodging at 1-48. In categorically denying Wellington Trade's motion, the Eleventh Circuit responded simply that the motion was "untimely filed." *See* Appendix 1.

Given the inherently important nature of judicial disqualification issues, the Eleventh Circuit's terse

decision highlights what are very important questions. For one, the Eleventh Circuit's decision is extremely unclear and provides no guidance whatsoever.

Did the court intend to rule that *vacatur* motions under § 455(a) which are brought after five years are categorically, *per se* untimely? Did the court actually apply a *per se* rule, or did it engage in some sort of reasonableness analysis? Did the court determine that, all things considered, Wellington Trade should have brought its motion sooner, even though Wellington Trade did not possess the information that demonstrates Judge Collier's disqualification? Did the court even recognize a distinction between the situation where a party purposely waits to bring a motion under § 455(a) (improperly, as an element of trial strategy) and the situation where a party "waits" to bring such a motion only because it did not learn the full nature of the disqualifying circumstances until significant time has lapsed?

Perhaps most importantly, the Eleventh Circuit's decisions in this case raise the simple question of whether a Court of Appeals may properly deny a *vacatur* motion on "timeliness" grounds at all, where the movant learned of the disqualifying circumstances only after the tainted opinion became final. The answers to these questions are unclear.

Moreover, the fact that the Eleventh Circuit's decision in this case is unreported is no excuse. Rather,

it is indicative of a pervasive practice in the Courts of Appeals of issuing a simple, terse denial without further analysis – particularly where the subject of the motion is an appellate judge rather than a trial judge.

Significantly, since 1924, the Courts of Appeals have issued published opinions in four hundred ninety-nine cases involving the disqualification of federal district court judges under all provisions of 28 U.S.C. § 455.[1/] In those four hundred ninety-nine cases, four hundred twenty-two of the published opinions of the Courts of Appeals found that the district judge in question was not disqualified. In only seventy-seven of the cases did the Courts of Appeals – either explicitly or implicitly by way of remand instructions – find the district judge to be disqualified.

The government's most recent numbers state that there are six hundred fifty-five authorized district judgeships and one hundred sixty-seven appellate judgeships in the United States, a ratio of approximately one appellate judgeship for every four district

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1/ This number, four hundred ninety-nine cases, represents Court of Appeals published decisions from 1924 to present, as reported by Shepard's Federal Citations, involving district court judges, and is exclusive of cases involving magistrates, bankruptcy judges and/or any other federal official. Likewise, this number excludes cases where the judge in question *sua sponte* recused himself, as well as opinions where 28 U.S.C. § 455 was merely mentioned but where disqualification thereunder was not expressly ruled upon.

judgeships, *see, e.g.* Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2000 Annual Report of the Director at 16, 22. Given that ratio, one might reasonably expect there to be one-fourth as many decisions involving appellate disqualification as there are decisions involving district judge disqualification.

There are not. The same research methodology, *supra*, reveals that, since 1924, the Courts of Appeals have issued published opinions in only thirty-six cases – a ratio of nearly one in fifteen – where the judge in question was an appellate judge, *i.e.*, either a Court of Appeals judge or a district judge sitting by designation. Incredibly, among those thirty-six decisions, there is not one reported decision where the appellate judge was found to be disqualified.

It is startling to note that, of those thirty-six reported cases involving appellate judges, in only four of them was the disqualification issue raised by a litigant's attorney. In the remaining thirty-two cases, the disqualification issue either came, *sua sponte*, from the court itself or from litigants acting *pro se* (or represented by some *pro bono* "project").

These numbers suggest some troubling things about our system of justice. First, they reveal that there is a dearth of case law giving specific guidance as to the disqualification of appellate judges – and giving guidance to the unique issues such disqualification

presents, such as the "harmless error" issue, *see* Lodging at 66-68, or the issue of a proper remedy, *see* Lodging at 71-74. Second, they suggest that the rights of litigants are being effectively nullified, because (a) there is no case law to guide them in asserting their rights, and (b) there are simply very few attorneys willing to take cases involving the disqualification of federal appellate judges.

When the practical effect of a law designed to provide both actual and apparent justice is that the law is rarely applied or explained in a meaningful way, justice withers. It is the place and, indeed, the duty of this Court to step in now to revive that failing ideal.

As the Court noted in *Aetna Life Ins. Co.*, *supra*, in order to satisfy due process, "justice must satisfy the appearance of justice." 475 U.S. at 825. *Accord Tumey v. Ohio*, 273 U.S. 510, 532 (1927). This principle is so long-held as to be axiomatic. *See also In re Murchison*, 349 U.S. 133, 136 (1955), *quoting Offutt v. United States*, 348 U.S. 11, 14 (1954)("to perform its high function in the best way, justice must satisfy the appearance of justice").

When the Courts of Appeals leave open questions about the very law governing disqualification, or issue terse orders without analyzing that law, their behavior itself fails to satisfy the appearance of justice, for it does not give the appearance of anything at all but a bare, unreasoned decision. Litigants in a given case

expect more, and the public is entitled to more. Significantly, there has never been a published Supreme Court opinion dealing with a case where the judge whose disqualification status was in question was a judge sitting on any Court of Appeals. This Court should grant *certiorari* in this case so that it can ultimately issue an opinion giving guidance to the Courts of Appeals so they may, in turn, guide the lower federal courts.

The importance of passing judgment on the Eleventh Circuit's decision in this case goes beyond the Eleventh Circuit's failure to issue a reasoned, analytical opinion. In addition to the fact that the order in question is unclear, the order involves a judge sitting by designation on the Court of Appeals, and the order is plainly erroneous under the law of the Eleventh Circuit.

Prior to the division of the then-Fifth Circuit and the creation of the now-Eleventh Circuit, the Fifth Circuit, in an opinion now binding on the Eleventh Circuit, ruled that the costs of disqualification can only be avoided if "each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned." *See Potashnick v. Port City Construction, Inc.*, 609 F.2d 1101, 1115 (5th Cir. 1980). Relying on this principle, the Eleventh Circuit has held that where the delay in bringing a *vacatur* motion is not the result of trial tactics – *i.e.*, holding back and "gambling" on the outcome – there is no *per se* timeliness requirement under 28 U.S.C. §

455(a). *See United States v. Kelly*, 888 F.2d 732, 746 (11th Cir. 1989).

The Eleventh Circuit's decision in this case blatantly runs afoul of that court's own rule, for Senior Judge Cox appears to have simply applied some sort of *per se* rule and ordered that Wellington Trade's motion was "untimely filed."

The plain error in this case illuminates why this Court should give strong consideration to a litigant's avenues for redress in a situation like this. Where the disqualification question concerns judges sitting on the Court of Appeals, the procedure is not clearly defined. A party may move for rehearing, or *en banc* rehearing, as Wellington Trade did in this case. *See, e.g.* Lodging at 91-113. However, in that situation, the burden on the party is extremely high – the party must essentially show the existence of an important question, as Wellington Trade did in this case, as well as a resulting conflict in either intra- or inter-circuit law, which Wellington Trade also did in this case – and the odds of getting a rehearing are quite low.

Because the Courts of Appeals are currently inundated with cases and are admittedly overburdened, the practical aspect of the rehearing or *en banc* rehearing procedure is that cases like this one simply do not get re-heard and errors like this are not redressed. The real-world aspect of this system is that litigants, like Wellington Trade, lose their case, on which, as

here, may ride the entire financial future of an individual and his family, or – even more troubling – the freedom of an individual from incarceration in criminal cases.

Despite that the courts are overflowing with cases, our system demands that the courts give more than mere lip service to the principles embodied in 28 U.S.C. § 455. The United States Court of Appeals for the Fifth Circuit long ago stated it very well in *Kinnear-Weed Corp. v. Humble Oil*, 441 F.2d 631 (5th Cir. 1971):

> It is impossible to conceive of an issue judges would scrutinize more carefully than one which charges that a brother's breach of judicial ethics has produced a miscarriage of justice. Such an issue puts at stake more than the rights of the immediate litigants; it challenges the even, fair administration of the law. Therefore our most attentive examination is commanded.

Very clearly, this case presents a situation where the Court's intervention is necessary. As set forth in Part II, *infra*, the Courts of Appeals are not in accord with respect to the procedural and timeliness aspects of 28 U.S.C. § 455(a). Where there is discord and uncertainty, as there is with respect to this law, and *where parties have such a minuscule practical chance to gain redress of erroneous decisions*, this Court

should speak swiftly and clearly to clarify the law of timeliness as it pertains to this statute.

When Congress enacted the current 28 U.S.C. § 455(a) it did so in order to clarify the law. When this Court has spoken about the disqualification issue, it has said that a party's rights to a fair tribunal rise to the highest, perhaps even constitutional, proportions. When a court renders a decision like the Eleventh Circuit did in this case, neither of those concerns are addressed and this Court's intervention is the only way to protect the institutional threat such decisions present.

II. The Circuits Are Divided Over the "Timeliness" Question Under 28 U.S.C. § 455(a).

In its decision, the Eleventh Circuit simply held that Wellington Trade's *vacatur* motion was "untimely filed." See Appendix. In so doing, the Eleventh Circuit created a conflict with its own case law, with this Court's decisions, and with that of the other Circuits.

First, as set forth, *supra*, the Eleventh Circuit has generally followed a "reasonableness" test for deciding the timeliness of vacatur motions based on disqualification. *See, e.g. United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989); *Bivens Garden Office Bldg. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898 (11th Cir. 1998). The decision in this case appears to disregard completely that reasonableness analysis.

Likewise, the Eleventh Circuit's *per se* approach appears to violate this Court's decision in *Liljeberg*, *supra*, where the Court validated a disqualification motion that was brought 10 months after the proceeding in question, after the movant learned of the disqualifying circumstances. *See* 486 U.S. at 869.

In addition, the majority of the other federal Circuits either do not apply a *per se* rule or expressly require a "reasonableness" analysis. *See, e.g. Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203 (5th Cir. 1998); *Bivens Garden Office Bldg. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898 (11th Cir. 1998); *Willner v. University of Kansas*, 848 F.2d 1023 (10th Cir. 1988); *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326 (2d Cir. 1987).

Though the Circuits have generally adopted a reasonableness test, many questions exist pertaining to the "timeliness" issue under 28 U.S.C. § 455(a). Is there a *per se* timeliness rule? If so, does that rule apply only where a party declines to act on potentially disqualifying information, pending the outcome of the court's decision in the case at hand, or does the timeliness rule apply where, as here, a party did not know of the information until after the proceeding at issue was closed? If the latter, is there or should there be a "reasonableness" test? If there is, or should be, a reasonableness test, would that test apply only where a party can demonstrate that it was not previously aware of the disqualifying circumstances? These are not

simply the Petitioner's questions. Rather, they are questions which confound the Courts of Appeals as well as potential future litigants.

While there is a basic split among the Circuits as to whether § 455(a) has a timeliness requirement at all, with the Seventh Circuit the lone holdout that has answered in the negative (with others, such as the Ninth Circuit, expressly declining to state whether there is a timeliness requirement), the Circuits are also split as to whether they even ask these questions and, if they do, how they approach the answer.

Currently, only the Seventh Circuit has long-established case law holding that disqualification motions under § 455(a) are not subject to a timeliness requirement. *See, e.g. SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977). Though Judge Posner has criticized it as a "weak" precedent, *see Schurz Communications v. FCC*, 982 F.2d 1057, 1061 (7th Cir. 1992), and it has been called into question in other Circuits, *see, e.g. Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997), *SCA Services* is still good law in the Seventh Circuit.[2/] *See, e.g. United States v.*

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[2] Even the case Judge Posner relies on to criticize *SCA Services* does not reach a contrary conclusion. Rather, in *United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976), the Seventh Circuit noted that it is "well-settled" that a party must raise the issue "at the earliest moment after knowledge of the facts demonstrating the basis" for disqualification. *Id.*, 542 F.2d at 390.

Murphy, 768 F.2d 1518 (7th Cir. 1985)(noting limits on timeliness where party purposefully delays in raising issue); *Edgar v. K.L*, 93 F.3d 256, 257 (7th Cir. 1996)(passage of time not conclusive).

Though this Court's *Liljeberg* opinion notes that timeliness may be an issue, see 486 U.S. at 867 (judge's silence denied party opportunity to make timely recusal request), *Liljeberg* nonetheless does not expand on the concept or give the lower courts specific guidance as to what is meant by "timely" or "timeliness." As a result, the Circuits other than the Seventh generally agree that there is some sort of "timeliness" requirement under § 455(a), even though it is a "judicially-implied" requirement. The problem is that though most, but not all, Circuits agree on the general rule, there is discord as to the application and parameters of the rule. More importantly, insufficient attention is given to the distinction between delay in bringing a motion under § 455(a) as a trial tactic and delay occasioned by a litigant's initial ignorance of the facts.

Some Circuits require the motion to be brought as soon as possible, *see, e.g. United States v. Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995)(timeliness rules are "judicially implied;" motion must be brought at earliest possible time after facts are ascertained). Others require that the timing of a motion be "reasonable." *See, e.g. United States v. Anderson*, 160 F.3d 231, 234 (5th Cir. 1998)("Section 455...obligates a party to raise the disqualification argument at a

reasonable time in the litigation"); *Bivens Garden Office Bldg. v. Barnett Banks of Florida, Inc.*, 140 F.3d 8898 (11th Cir. 1998). Still others simply state that a motion must be "made in a timely fashion," without further explication. *See, e.g. Davies v. Commissioner*, 68 F.3d 1129, 1131 (9th Cir. 1995); *United States v. Owens*, 902 F.2d 1154 (4th Cir. 1990).

When there is discord among the Circuits and no clear-cut answer to the question of timeliness under § 455(a), courts make mistakes, as the Eleventh Circuit did here. This case presents the Court with an opportunity to speak clearly and provide much-needed guidance to the lower federal courts, especially given the lack of means for redress in cases like this.

CONCLUSION

For the foregoing, the Petition should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2936

WELLINGTON TRADE, INC.,
d/b/a CONTAINERHOUSE,

Plaintiff-Counterdefendant-
Appellee-Cross-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Counterclaimant-
Appellant-Cross-Appellee.

On Appeal From The United States District Court
For The Middle District Of Florida

(Filed Mar. 7, 2001)

ORDER:

Appellee's motion to recall this Court's mandate, for vacatur and for rehearing is DENIED as untimely filed.

The motion for supplemental briefing and oral argument, contained in Appellant's response to the above motion, is DENIED AS MOOT.

/s/ E. R. Cox
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2936

WELLINGTON TRADE, INC.,
d/b/a CONTAINERHOUSE,

Plaintiff-Counterdefendant-
Appellee-Cross-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Counterclaimant-
Appellant-Cross-Appellee.

On Appeal From The United States District Court
For The Middle District Of Florida

(Filed June 6, 2001)

ORDER:

BEFORE: ANDERSON, Chief Judge, DUBINA and Cox, Circuit Judges.

BY THE COURT:

Appellee's "petition on behalf of Wellington Trade, Inc. for *en banc* rehearing," which is construed as a motion for reconsideration of this Court's March 7, 2001, Order, is DENIED.

Supreme Court, U.S.
FILED
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01-446 AUG 31 2001
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

WELLINGTON TRADE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of *Certiorari*
To The United States Court Of Appeals
For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2936

D.C. Docket No. 91-784-CIV-J-10

WELLINGTON TRADE, INC. d/b/a CONTAINERHOUSE,

Plaintiff-Counterdefendant-Appellee, Cross-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Counterclaimant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(September 7, 1994)

Before COX, Circuit Judge, MORGAN, Senior Circuit Judge, and COLLIER*, District Judge.

PER CURIAM:

In this governmental contract case, the United States appeals a judgment of the district court rendered in favor

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*Honorable Lacey A. Collier, U.S. District Judge for the Northern District of Florida, sitting by designation.

of Wellington Trade d/b/a Containerhouse (Containerhouse). Containerhouse, in turn, cross-appeals the court's ruling the Government did not breach their contract for the sale of ocean freight containers to the Government. We AFFIRM in part and REVERSE in part.

I. BACKGROUND

In the fall of 1990, the Government sought to procure a large quantity of ocean freight containers to transport ammunition overseas for the military. Though the Government needed the containers to support Operation DESERT SHIELD/DESERT STORM, the Government also had to transport ammunition stocks from Europe back to the United States as part of a gradual withdrawal of U.S. troops from Europe. To procure these containers, the Government issued a "Master Solicitation" to companies in late 1990 seeking offers. Containerhouse, with offices in Jacksonville, Florida, was one of the companies receiving this "Request for Proposals" (RFP).

In its original form, the RFP called for offers to lease the Government freight containers meeting Coast Guard specifications for carrying class "A" explosives. This request was later changed to a purchase order. Of particular concern to the present dispute, the RFP contained several provisions regarding the Government's authority to inspect and accept containers. In clauses "E-1" and "E-1.1," the RFP detailed the Government's right to conduct a pre-delivery inspection of the containers[1] and

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[1] As originally worded, clause E-1 read:
At the discretion of the Government, a pre-delivery inspection of the containers leased shall be held at the

accept the containers at the destination.[2] Clause "E-2" incorporated into the RFP several standard clauses in the Federal Acquisition Regulations (FARs) found in the Code of Federal Regulations. These clauses included 48 C.F.R. § 52.246-2 (Inspection of Supplies – Fixed Price)[3],

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contractor's facility by a Government representative and/or U.S. Coast Guard representative. At any time of inspection and delivery, the Government has the right to reject any container which does not meet the specifications in Section C of this RFP.

[2] Clause E-1.1 read in relevant part:

Final inspection and acceptance of the supplies to be furnished hereunder shall be made at destination specified in Subpart A, Box 2 of this RFP by the receiving activity. The receiving activity shall execute acceptance certification, if appropriate, on the applicable inspection and receiving report. . . .

Any damages suffered intransit are the responsibility of the contractor and shall be corrected prior to acceptance. . . .

[3] The clause spelled out in 48 C.F.R. § 52.246-2 states in relevant part:

INSPECTION OF SUPPLIES – FIXED-PRICE

(c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(f) The government has the right either to reject or to require correction of non-conforming supplies. Supplies are non-conforming when they are defective in

§ 52.246-15 (Certificate of Conformance)[4] and § 52.246-16 (Responsibility for Supplies)[5].

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material or workmanship or otherwise not in conformity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

(k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

[4] The clause set out in 48 C.F.R. § 52.246-15 reads in pertinent part:

CERTIFICATE OF CONFORMANCE

(c) The Government has the right to reject defective supplies or services within a reasonable time after delivery by written notification to the Contractor. The Contractor shall in such event promptly replace, correct, or repair the rejected supplies or services at the Contractor's expense. . . .

[5] The clause set out in 48 C.F.R. § 52.246-16 reads in pertinent part:

RESPONSIBILITY FOR SUPPLIES

(a) Title to supplies furnished under this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

On January 24, 1991, the Government faxed to Containerhouse and other potential offerors an amendment to the original RFP. The amendment specified the quantities of containers desired as well as several delivery destinations. It also set a February 7, 1994 delivery date. The amendment further deleted clause E-1.1 from the contract, and modified clause E-1 to read: "At the discretion of the Government, a pre-delivery inspection of the containers may be held. . . . " Otherwise, the amendment left untouched the original provisions concerning inspection and acceptance.

In the early morning hours of January 30, 1991, Mr. Tom Sikes, president of Containerhouse, faxed the Government his offer. He made this offer by writing his own conditions regarding prices and quantities directly on the Government's January 24 amendment. Though Mr. Sikes did not mention any of the FAR clauses governing inspection and acceptance, he wrote the following condition on his offer:

(b) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies shall remain with the Contractor until, and shall pass to the Government upon –

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Acceptance by the Government or delivery of the supplies to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

(c) Paragraph (b) above shall not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss or damage to such non-conforming supplies remains with the Contract or until cure or acceptance.

> Our offer is conditioned on the provision that [the containers] be inspected at the city of origin rather than at the destination. For boxes to which the inspector may take exception, we have lined up substantial repair capability to work this weekend and early next week.

At trial, Mr. Sikes testified he added this condition because Containerhouse had no capacity to repair any containers at the destinations specified in the amended RFP (Anniston, Alabama or Lexington, Kentucky). Consequently, he wanted the Government to conduct any inspection for conformance to contract specifications at the city of origin – Jacksonville, Florida.

The Government, however, objected to this condition. After some negotiation, Mr. Sikes changed his offer by deleting the words "rather than" from his condition and inserting "with final acceptance" in their stead. As ultimately submitted, the condition read:

> Our offer is conditioned on the provision that [the containers] be inspected at the city of origin, with final acceptance at the destination.

The Government accepted this wording, and awarded Mr. Sikes and Containerhouse a contract for 134 containers to be delivered to the Anniston Army Depot in Anniston, Alabama. The Government sent Containerhouse a document titled "Award/Contract" specifying the quantity of containers ordered as well as the price to be paid. In addition, this document included the following statement:

"Final Inspection and Acceptance: (See Clause E-1.1)" Clause E-1.1 is the same clause the Government deleted from the RFP in its January 24 amendment. At trial, Mr.

Sikes admitted he overlooked this statement when he received the document and therefore did not protest.

On the day it received the contract, Containerhouse purchased the containers it would ultimately deliver to the Government. As the Government was aware, Containerhouse intended to supply used containers. After purchase, Containerhouse had the containers delivered to a repair facility in Jacksonville. Containerhouse instructed the repair facility to refurbish the containers to contract specifications. The repair facility promptly began repairing the containers according to the Coast Guard specifications included in the original RFP.

Concurrent with purchasing the containers, Containerhouse requested the Government send an inspector to the repair facility as soon as possible. After some delay on its part, the Government sent Henry Huffman of the Defense Contract Management Command to inspect Containerhouse's containers at the Jacksonville repair facility. Over the course of two days, Huffman inspected the containers to determine whether they conformed to contract specifications. Though Huffman was a certified government quality inspector, he apparently had little prior experience examining ocean freight containers. Moreover, Huffman inspected many of the containers at night with a flashlight. Ultimately, Huffman certified on "DOD 250" forms that all 134 containers met the contract specifications.[6]

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[6] A DOD 250 form is a standard government procurement document on which a government agent certifies supplies procured under a contract satisfy the contract requirements. The same DOD 250 form is also used to certify receipt and formal acceptance of contract goods.

On February 11 and 12, trucks bearing the 134 containers arrived at the Anniston depot and were off-loaded by depot personnel. During the unloading, Mr. Sikes obtained signatures on all the DOD 250 forms indicating the containers had been "accepted" by the Government. The people signing these forms had supervised the off-loading and storage of the containers at the base. These people, however, were not certified quality assurance inspectors. After Mr. Sikes departed Anniston on February 12, quality assurance personnel at Anniston thoroughly inspected the containers. After three days of inspections, they concluded none of the containers met contract specifications. Consequently, the Government rejected the containers and returned Containerhouse's invoices unpaid.

In response, Containerhouse argued the containers met contract specifications and the DOD 250 forms indicated the Government had accepted the goods. After negotiations to resolve the dispute fell through, Containerhouse filed a written claim pursuant to the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, with the Government's contracting officer. The contracting officer denied the claim and requested Containerhouse remove the containers from the Anniston depot. Containerhouse refused, and subsequently filed the instant action.

Originally, Containerhouse filed suit in the United States Claims Court. This action was transferred to the District Court for the Middle District of Florida, however, on the basis of admiralty jurisdiction.[7] In its amended

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[7] The contract at issue is deemed a "maritime" contract because it concerns the sale of freight containers used aboard

complaint, Containerhouse alleged claims under the Contract Disputes Act for breach of contract and warranty, estoppel, and termination for the convenience of the government. The Government in turn asserted a counterclaim for the amounts it has expended in moving and storing the containers at Anniston.

After a six-day bench trial, the district court held in favor of the Government on the breach of contract, warranty and estoppel claims. The court interpreted the contract as allowing the Government to conduct quality inspections in both Jacksonville and Anniston. Moreover, the inspection in Jacksonville was for the benefit of the Government; and the Government retained the right to reject the goods after inspection at Anniston. The court concluded the persons signing the DOD 250 forms at Anniston had no authority to do so, and therefore the Government never accepted the containers. Finally, in light of the evidence, the court found Containerhouse had not delivered conforming goods and the Government properly rejected the containers. In its cross-appeal, Containerhouse contests these rulings by the district court.

The court held in favor of Containerhouse, however, on its claim for termination for the convenience. The court noted Mr. Sikes' concern prior to entering into the contract that Containerhouse could not repair any containers in Anniston – a concern the Government knew about at the time. Although the inspection at Jacksonville was for the Government's benefit, the court concluded

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ocean-going ships. Containerhouse did not bring suit under admiralty law, however. Instead, it asserts claims under the Contract Disputes Act.

Containerhouse reasonably relied on the inspector's determination the containers were satisfactory. Thus, the court concluded the Government "was not without fault" in this case, and subsequently entered judgment in Containerhouse's favor for $322,239.04. At the same time, the court dismissed the Government's counterclaim. The Government appeals this judgment and the dismissal of its counterclaim.

II. DISCUSSION

A court's interpretation of a contract is a conclusion of law and hence reviewed *de novo*. *Coflexip & Services, Inc. v. United States*, 961 F.2d 951, 952 (Fed. Cir. 1992); *Int'l Brotherhood of Boilermakers v. Local Lodge D111*, 858 F.2d 1559, 1561 (11th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989).

In its cross-appeal, Containerhouse contests the district court's interpreting the contract to permit the Government to conduct quality inspections both at origin and at destination. In particular, Containerhouse contends the district court erred in not considering extrinsic evidence to explain the phrase "final acceptance" as used in Containerhouse's hand-written condition. Again, the issue of whether a contract's terms are ambiguous and therefore require inquiry into extrinsic evidence is an issue of law subject to *de novo* review. *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698, 700-701 (11th Cir. 1993). We find the district court properly excluded extrinsic evidence and correctly interpreted the contract regarding the Government's right to inspect the containers prior to acceptance.

When the terms of a contract are unambiguous, extrinsic evidence is not admissible to contradict those terms. *Id.* at 702. Nor is extrinsic evidence admissible initially to prove the existence of an ambiguity. *Id.* Instead, the ambiguity must appear on the face of the contract. *Id.* Furthermore, a contract must be interpreted as a whole to give meaning to all its parts so as not to render some parts meaningless. *Granite Construction Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 965 (1993).

With these principles of contract law in mind, we find no ambiguity regarding the Government's right to inspect the containers at Anniston prior to acceptance. Regardless of whether clause E-1.1 was part of the final contract, the other clauses in section E of the RFP unequivocally reserved to the Government the right to conduct a second quality assurance inspection at Anniston prior to acceptance. FAR clause 52.246-2, adopted by reference into the contract, permits the Government:

> (c) . . . to inspect and test all supplies called for by the contract, to the extent practicable, *at all places and times*, including the period of manufacture, and *in any event before acceptance.*

(emphasis added). This same clause goes on to state:

> Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance.

Another FAR clause adopted by reference, 52.246-15, permits the Government "to reject defective supplies or services within a reasonable time after delivery by written notification to the Contractor." Finally, FAR clause 52.246-16 states title to the containers would "pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title."

Read together, these clauses permitted the Government to perform a thorough inspection at Anniston prior to acceptance. Under these provisions, the Government reserved to itself the right to conduct quality inspections at any time prior to formal acceptance. The FAR clauses did not restrict the Government to inspecting for in-transit damage at Anniston. Instead, these clauses envision the Government retaining the right to reject non-conforming containers until the moment of formal acceptance. As the Government did not formally accept the containers at the moment they arrived at Anniston, it retained the right to inspect the containers a second time.[8]

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[8] We arrive at this conclusion without determining whether clause E-1.1 was part of the final contract between the parties. This clause, stating "[f]inal inspection and acceptance of the supplies . . . shall be made at destination . . . ," is consistent with the interpretation discussed above: the Government had the right to conduct a second quality inspection at Anniston. On its face, this clause does not contradict the other terms of the contract. More importantly, the Government did not have to rely on clause E-1.1 in conducting a quality inspection at Anniston. Since the contract clearly spelled out the Government's right to inspect the containers at destination, the issue of whether clause E-1.1 was part of the final contract is irrelevant.

Interpreted in light of these clauses, the condition the containers "be inspected at the city of origin, with final acceptance at the destination" did not prevent the Government from conducting a quality inspection at Anniston. Containerhouse argues "final acceptance" can be interpreted as permitting only an inspection for in-transit damage at destination. Such an interpretation, however, contradicts the plain meaning of the FAR clauses discussed above and would render them inconsequential. Since the contract must be interpreted as a whole, it is unreasonable to interpret "final acceptance" as limiting the Government's right of inspection at destination to in-transit damage only. Since there is no ambiguity on the face of the contract, the district court properly excluded extrinsic evidence on this issue.

Containerhouse maintains the district court's interpretation of "final acceptance" conflicts with certain FAR provisions. In particular, Containerhouse claims this interpretation is inconsistent with the definition of "acceptance" under the FARs. Moreover, a finding that the Government acted properly by inspecting the containers a second time at destination allegedly conflicts with FAR section 46.401(d):

> If a contract provides for delivery and acceptance at destination and the Government inspects the supplies at a place other than destination, the supplies shall not ordinarily be reinspected at destination, but should be examined for quantity, damage in transit, and possible substitution or fraud.

48 C.F.R. § 46.401(d) (1993). Citing *G.L. Christian and Associates v. United States*, 312 F.2d 418 (Ct. Cl.), *cert.*

denied, 375 U.S. 954 (1963) and *S.J. Amoroso Const. Co. v. United States*, 26 Cl. Ct. 759 (Cl. Ct. 1992), *aff'd*, 12 F.3d 1072 (Fed. Cir. 1993), Containerhouse states these regulations have the force of law. Consequently, because the Government conducted a quality inspection at Jacksonville, it had no authority to conduct an inspection at Anniston that went beyond checking for in-transit damage. We find these arguments unavailing.

In discerning the meaning of "final acceptance," we are not bound by the distinction drawn in subpart 46 of the FARs between the terms "acceptance" and "inspection." Under section 46.101 of the FARs, "acceptance" means the bare act of assuming ownership of the goods. 48 C.F.R. § 46.101 (1993). "Inspection," by contrast, is defined in the same section as "examining and testing supplies or services . . . to determine whether they conform to contract requirements." *Id.* Applying these definitions to the phrase "final acceptance," it is possible to argue the Government was limited to acknowledging ownership of the containers upon arrival at Anniston.

The definitions in section 46.101, however, were not part of the contract between Containerhouse and the Government. The particular definitions of "acceptance" and "inspection" relied upon by Containerhouse apply only to subpart 46 of the FARs. *Id.* at § 46.101. These definitions were not incorporated into the contract as were other standard FAR clauses found in subpart 52 of the FARs. Since these definitions were not part of the contract between the parties, they cannot be relied upon to discern the meaning of "final acceptance" as used in the contract.

Instead, the proper course is to interpret this term in relation to the other clauses explicitly incorporated into the contract. In light of the other contract provisions governing inspection and acceptance, the phrase "final acceptance" implies a right to inspect the containers and make a final determination on quality prior to formal acceptance.

Containerhouse's argument based on section 46.401(d) does not undermine this conclusion. This section was not incorporated into the contract between the parties. Instead, it represents a "policy" or "procedure" for contracting agencies and contract administrators to follow. 48 C.F.R. § 46.000 (1993). While the Government may have violated its own policy when it conducted a quality assurance inspection in Anniston, it was acting within its contract rights in this particular case.[9].

Containerhouse argues that because the FARs have the "force of law," section 46.401(d) determines the Government's right to inspect the containers regardless of the clear meaning of the contract's terms. In support of this contention, Containerhouse cites *S.J. Amoroso* and *G.L. Christian*, While these cases state the FARs have the "force

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[9] Moreover, it does not appear the Government contravened section 46.401(d) when it inspected the containers at Anniston. This provision states supplies should not "ordinarily" be inspected a second time at destination for conformity with the contract specifications. The record indicates, however, this might not have been the "ordinary" case. Given the rushed procurement and the fact these were used containers purchased to carry explosive ammunition, it is reasonable to assume a second quality inspection by inspectors familiar with ammunition containers was called for.

of law," they are distinguishable from the present case. In both *S.J. Amoroso* and *G.L. Christian*, the regulations expressly required the contracts at issue contain particular standardized clauses. *S.J. Amoroso*, 26 Cl. Ct. at 764; *G.L. Christian*, 312 F.2d at 424. In *G.L. Christian*, the regulations required the inclusion of a termination for convenience clause which was inadvertently left out of the final contract. *G.L. Christian*, 312 F.2d at 424. In *S.J. Amoroso*, the regulations mandated the inclusion of a standard clause incorporating the rules of the Buy American Act. *S.J. Amoroso*, 26 Cl. Ct. at 764. As in *G.L. Christian*, the contract lacked the proper clause. *Id.* at 765. Since the regulations had the force of law and explicitly directed the inclusion of particular clauses, the contracts at issue in both cases had to be read as if they had incorporated those clauses. *Id.* at 767; *G.L. Christian*, 312 F.2d at 427.

In the present case, however, section 46.401(d) does not direct that it or any other clause be inserted into the contract between Containerhouse and the Government. Instead, 46.401(d) is a statement of policy guiding the Government's conduct in "ordinary" situations. Since 46.401(d) does not direct the inclusion of any clause into the contract, we find the rule of *G.L. Christian* and *S.J. Amoroso* not applicable in this case. Section 46.401(d) did not bar the Government from inspecting the containers a second time at Anniston.

Thus, when the Government inspected the containers a second time at Anniston, it acted within its rights. Furthermore, the Government never relinquished its power to reject the containers for non-conformance until it formally accepted them at Anniston. Both at trial and

on appeal, Containerhouse argues the Government formally accepted the containers when Anniston personnel signed the DOD 250 forms. At this point, according to Containerhouse, the Government lost the ability to reject the containers.

The persons signing the forms at Anniston, however, had no authority to sign on behalf of the Government. In particular, they were not quality assurance inspectors authorized to accept goods for the Government. Indeed, the record indicates all four signed under the belief they were merely acknowledging receipt of the containers – not accepting them for the Government. It is incumbent upon a party dealing with a government agent to ascertain the scope of the agent's actual authority. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 92 L.Ed. 10 (1947). The Government cannot be bound or estopped on the basis of its agent's conduct when that conduct exceeds the scope of his authority. *United States v. Walcott*, 972 F.2d 323, 325 (11th Cir. 1992); *Brundidge Banking Co. v. Pike County Agric. Stabilization and Conservation Comm.*, 899 F.2d 1154, 1160 (11th Cir. 1990). Here, the Anniston personnel signing the DOD 250 forms plainly exceeded their authority. Consequently, the Government was not bound by these signatures.

Since the Government did not accept the shipment upon arrival, it retained the right to inspect and reject the containers. When the Government's quality assurance personnel inspected the containers, they found none of them met applicable Coast Guard specifications. This finding was later confirmed by the Government's outside expert. The Government, therefore, acted completely within its rights in rejecting the containers after delivery.

Based on these findings, the district court held in favor of the Government on Containerhouse's breach of contract claim. As a result, the court ruled Containerhouse was not entitled to recover the contract price in damages. We affirm this portion of the court's ruling. The court, however, went on to hold Containerhouse was entitled to recover on its alternative claim of termination for convenience. The Government appeals the court's conclusion on this issue.

Initially, the Government attacks Containerhouse's termination for convenience claim by arguing the district court lacked subject matter jurisdiction over this count. Prior to filing suit under the Contract Disputes Act, a contractor must submit any claim in writing to the Government's contracting officer. 41 U.S.C.A. § 605(a) (West 1987). A district court cannot exercise subject matter jurisdiction over a claim brought under the Act unless it has first been submitted to the contracting officer. *Id.* at §§ 605 and 609; *Dawco Construction Co. v. United States,* 930 F.2d 872, 877 (Fed. Cir. 1991). The purpose of this requirement is to give the Government "an opportunity to settle the case or otherwise avoid unnecessary litigation." *SMS Data Products Group, Inc. v. United States,* 19 Cl. Ct. 612, 614 (1990). Citing this statutory requirement, Containerhouse submitted a written claim to the Government on February 28, 1991. Containerhouse thereby gave the contracting officer an opportunity to resolve this case prior to litigation. Consequently, we find the district court properly exercised jurisdiction over this claim.

The contract between the Government and Containerhouse incorporated a standard "termination for convenience" clause. This clause, unique to the world of governmental contracts, states:

> (a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest.

48 C.F.R. § 52.249-2 (1993). If the Government terminates for convenience, the clause essentially limits the Government's liability to the contractor's out-of-pocket costs incurred prior to termination. *Id.* By limiting a contractor's damages, such a clause makes it advantageous for the Government to terminate a contract when the contract no longer benefits the Government.

Based in part on the presence of this clause in governmental contracts, courts have developed the related doctrine of "constructive" termination for convenience. *See Maxima Corp. v. United States*, 847 F.2d 1549, 1552-53 (Fed. Cir. 1988). In limited circumstances, courts will retroactively apply the termination for convenience clause of a contract when the Government has acted without legal justification to terminate the contract. *Id.* at 1553. Typically, courts will find a constructive termination

> in situations in which the government has stopped or curtailed a contractor's performance for reasons that turn out to be questionable or invalid. Constructively, the clause can justify the government's actions, avoid breach and limit liability.

Torncello v. United States, 681 F.2d 756, 759 (Ct. Cl. 1982). As when it invokes the clause during performance, the Government will normally be liable for only the costs the contractor incurred prior to termination. In this fashion, the Government, avoids liability for a contractor's anticipatory profits – the typical remedy for breach of contract.

Given its remedial effect, the doctrine of constructive termination for convenience is typically invoked by the Government when it is sued by a contractor for an alleged breach of contract. *See id.* at 756. In this case, however, Containerhouse advances the doctrine as an alternate theory of liability. The district court found the Government liable on this theory for the costs Containerhouse incurred in performing the contract. We conclude the district court erred in granting judgment for Containerhouse on this claim.

Though the court did not state the Government had breached the contract, it concluded the Government was "not without fault" in this case. Particularly, the court found Containerhouse reasonably relied on Mr. Huffman's inspection in Jacksonville and his assurance the containers met contract specifications. The court cited the Government's awareness at the outset of Containerhouse's inability to repair the containers in Alabama and thus its desire to have a quality assurance inspection in Jacksonville. Given this knowledge of Containerhouse's predicament, the Government bore some responsibility for Mr. Huffman's ineffective inspection. The court further noted the personnel at Anniston purported to accept the containers and thus certified they met contract specifications. On these grounds, the court held the Government had constructively terminated the contract for its convenience.

This holding, however, is inconsistent with the court's earlier finding the Government had not breached the contract by conducting a second quality inspection and ultimately rejecting the containers. To trigger the doctrine of constructive termination for convenience in a given case, the Government must have acted in some fashion to terminate or curtail the contractor's performance under the contract. *See Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Maxima Corp.*, 847 F.2d at 1553; *Torncello*, 681 F.2d at 759; *see generally*, Tim A. Thomas, Annotation, *Application, to Determination of Government's Liability Under Public Contract, of Doctrine of "Constructive" Invocation of Clause Authorizing Termination for Convenience of Government – Modern Cases*, 104 A.L.R. Fed. 661 (1993) (summarizing relevant case law from the Federal Circuit, Claims Court and Court of Claims regarding the doctrine's application). Here, the Government did not breach the contract or otherwise curtail Containerhouse's performance. As explained above, the Government acted entirely within its contract rights in dealing with Containerhouse. Consequently, no basis exists for finding the Government constructively terminated the contract for its convenience.

Containerhouse advances two grounds supporting a constructive termination in this case. First, Containerhouse claims the Government either intentionally or negligently hindered its performance. Here, Containerhouse relies on the district court's finding the Government bore some fault for Containerhouse's relying on Mr. Huffman's faulty inspection in Jacksonville. Second, Containerhouse contends the circumstances surrounding the contract changed so that at the time of delivery, the

Government no longer needed the containers. For this reason, according to Containerhouse, the Government rejected the containers. We are not persuaded by either of these arguments.

Initially, we agree with the district court that the Government is not entirely blameless in this case. By not properly inspecting the containers in Jacksonville and approving them prior to shipment, the Government mislead Containerhouse. Still, the Government's conduct did not amount to a breach of contract. Nor did the Government curtail or prevent Containerhouse from performing the contract.

Under the terms of the contract, the Government was not obligated to conduct a proper inspection at Jacksonville. FAR clause 52.246-2, incorporated by reference into the contract, states:

> (c) . . . The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in the [sic] this contract.
>
> (k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance.

Since the contract did not specify otherwise, the inspection at Jacksonville was for the Government's benefit. Though Mr. Huffman's failure to properly inspect the containers was regrettable, Containerhouse had no reason under the contract to rely on the Government's initial conclusion regarding quality. Containerhouse remained obligated under the contract to deliver conforming goods

to Anniston regardless of the outcome of the Jacksonville inspection. The Government's determination on quality only became binding upon the Government when it inspected the containers to determine whether to accept or reject the shipment. Given the unequivocal terms of the contract, the Government did not breach the contract or curtail Containerhouse's performance in any fashion.

In ruling on the constructive termination claim, the district court analogize the instant case to *Malone v. United States*. The *Malone* court, however, concluded the Government had "materially breached" the contract at issue. Malone, 849 F.2d at 1445. In *Malone*, the Government contracted with the plaintiff to paint 265 houses. The contract called for the plaintiff to paint an exemplar house to serve as a qualitative benchmark for work on the remaining homes. The contract specifically required the Government to accept the standard of the exemplar house. The Government, however, delayed formally accepting the exemplar and mislead [sic] the contractor into believing the exemplar represented the relevant workmanship standard. When the Government ultimately rejected the exemplar, the plaintiff had already performed 70% of the work under the contract. *Id.* at 1442. On this basis, the Malone court concluded the Government had breached the contract through subterfuge and failing to act in good faith towards the plaintiff. *Id.* at 1445-46.

The Government's contractual obligations in *Malone* contrast sharply with its obligations in the instant case. In *Malone*, the Government was obligated to inspect and accept the workmanship standards of the exemplar. The contract in that case envisioned the plaintiff relying on

the Government's approval of the exemplar house. In the present case, however, the contract provides no basis for Containerhouse's reliance on the government's inspection in Jacksonville. Unlike the agreement in Malone, the contract between the Government and Containerhouse did not envision Containerhouse relying on the inspection in Jacksonville as part of its performance under the contract. For these reasons, we find *Malone* inapposite.

As a second basis for constructive termination, Containerhouse argues the circumstances surrounding the contract changed thereby prompting the Government to terminate the contract by rejecting the containers. In particular, Containerhouse posits the winding down of Operation DESERT STORM in mid-February 1991 reduced the military's need for ammunition containers. As a result, the Government rejected the containers upon arrival at Anniston.

While some courts have reasoned "changed circumstances" are a pre-requisite to upholding an actual or constructive termination for convenience, *see, e.g., Maxima Corp.*, 847 F.2d at 1552-53, changed circumstances alone are not a basis for constructive termination. *See Id; see generally,* Thomas, *supra* (summarizing case law regarding the role of changed circumstances). Even if the circumstances surrounding the contract have changed, the Government must act in some fashion to breach the contract or curtail the contractor's performance for there to be a termination for convenience – constructive or actual.

In essence, Containerhouse contends the Government rejected the containers pretextually. The record, however,

does not bear out this claim. Instead, the record amply supports the district court's conclusion the containers Containerhouse delivered to Anniston were defective. In rejecting the containers for failing to meet contract specifications, the Government was acting within its rights under the contract. Thus, regardless of the Government's need for the containers, there is no basis for a constructive termination for convenience.

III. CONCLUSION

We find the district court erroneously ruled in favor of Containerhouse on its constructive termination for convenience claim. We therefore REVERSE that portion of the court's judgment. We AFFIRM, however, the court's interpretation of the Government's authority under the contract to inspect the containers and its finding the Government properly rejected the containers at Anniston. Since the trial court dismissed the Government's counterclaim on the basis of its holding on the constructive termination claim, the Government's claim must be reinstated and the case remanded for disposition of the counterclaim.

AFFIRMED in part, REVERSED in part, and REMANDED.

[p. 1] UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WELLINGTON TRADE, INC., d/b/a CONTAINERHOUSE, Plaintiff, -vs- UNITED STATES OF AMERICA, Defendant.	CASE NO. 91-784-Civ-J-10 Courtroom Number Two March 22, 1993 9:30 a.m.

TRANSCRIPT OF NON-JURY TRIAL PROCEEDINGS
before
THE HONORABLE WM. TERRELL HODGES
United States District Judge

APPEARANCES:

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(Proceedings reported by microprocessor stenography; transcript prepared by computer.)

* * *

[p. 4] transcript.)

THE COURT: Who speaks for the government?

MR. KANE: Mr. Mendelsohn, Your Honor.

THE COURT: All right.

(The closing argument on behalf of the government was reported in full but not made a part of this transcript.)

THE COURT: All right. Thank you, counsel. Let's take a ten-minute break, after which, Mr. Tobin, I'll allow you ten additional minutes, but no more, if you wish for rebuttal. But for now, we'll take a ten-minute break.

(Recess, 11:20 a.m.)

(Reconvened, 11:30 a.m.)

(The rebuttal closing argument on behalf of the plaintiff was reported in full but not made a part of this transcript.)

THE COURT: Thank you, counsel. Let me say at the outset of my remarks that I appreciate the professionalism and the ability with which this case has been tried

and presented on both sides. And because of the thoroughness of your presentation and your arguments, I think I can safely say that the issues are clearly defined. And while they are not simple in their resolution, I will never be in a better position than I am at this moment to decide at least some of them. So it's my intention to state some oral findings and [p. 5] conclusions at this time on the record with respect to what I perceive to be the central issues in the case, both factually and legally or, as is so often the case, mixed questions of fact and law.

I've already stated at the conclusion of the evidence on Friday what I had perceived the issues to be. And it would appear from your arguments this morning that there is at least no substantial disagreement with respect to what the issues are. The disagreement, of course, exists with respect to how the issues should be resolved.

And the first one is what was the contract of the parties with specific reference to the government's right of inspection prior to acceptance. Or stated somewhat more specifically, was the government's right of inspection at destination rather than at origin limited as claimed by the plaintiff to inspection for damage in transit and not for quality assurance or compliance with the contract.

On that issue, the exhibits which I think have the most importance are Plaintiff's Exhibit 9 and Defendant's Exhibit 4. Plaintiff's Exhibit 9 is the plaintiff's corrected or clarified proposal or his best and final offer, and Defendant's Exhibit 4 is the government's award of contract or, in effect, acceptance of the plaintiff's offer.

And on this issue, I must say I'm inclined to agree with the government's position. First of all, to even [p. 6]

consider oral testimony concerning what the negotiations of the parties might have been, it's necessary to find some ambiguity or uncertainty in the handling of the written contract documents themselves. And to me, there is no such ambiguity, even in the plaintiff's final proposal, Plaintiff's Exhibit No. 9.

The operative language of that proposal is, quote, "Our offer is conditioned on the provision that they," referring to the contract goods, "be inspected at the city of origin." Originally at that point the proposal was "rather than at destination." The term "rather than" was stricken and the phrase "with final acceptance at destination" inserted.

"Final acceptance," of course, is a term of art, which means an acknowledgment by the contracting parties that the goods tendered or delivered pursuant to the contract conform to the requirements of the contract or the specifications of the contract. And that, as I think the government rightly argues, necessarily implies a reasonable opportunity to make a reasonable inspection of the goods prior to acceptance. That is to say, something more than a mere acknowledgment that goods purporting to comply with the contract were received at the point of destination.

But beyond that, even if there was some uncertainty about the meaning of that language, the government's [p. 7] position is also fortified, I think, by the award of contract, Defendant's Exhibit 4, which in the typewritten attachment forming a part of that document. And in a rather clear and conspicuous manner, as distinguished

from hidden fine or small print, the provision was inserted, "Final inspection and Acceptance. See clause E-1.1," which is the much-discussed clause providing for inspection at the point of destination.

As indicated by the question I asked of Mr. Tobin at the outset of the argument this morning, it seems to me analytically that if that provision is deemed to be inconsistent with the plaintiff's final proposal, Plaintiff's Exhibit No. 9, then it must be treated in law as a rejection and a counteroffer which the plaintiff then is deemed to have accepted by undertaking performance or attempted performance, substantial performance, of the remaining terms of the contract, which clearly he did. And as counsel says, Mr. Sikes candidly admitted that he simply overlooked or failed to read or did not see that provision in the government's award of contract at the time it was made.

So on the first issue, as I see it and as I stated it the other day, I am constrained to find for the government and conclude or find in fact and conclude in law that the contract of the parties did in this instance contemplate and [p. 8] provide for a double or redundant inspection with respect to quality assurance or compliance of the goods with the contract, one to be made at the point of origin, and the other to be made preliminarily to acceptance at the point of destination.

I might say that that is also entirely consistent in this case with the testimony of Colonel Gore, which I credit, that it was at his insistence that the contract provide precisely for what might otherwise be regarded as a repetitive or redundant inspection.

That brings me then to the second issue, and that is, regardless of the government's rights concerning inspection at the point of destination, were the goods, or in this instance the containers, nevertheless accepted, quote, unquote, by authorized representatives of the United States at the Anniston Army Depot.

I indicated on Friday, I think, a clear impression with respect to that issue that there was no effective acceptance at Anniston, because the persons who signed in the middle blocks on the DD250 form, that is, Plaintiff's Exhibit No. 5, Mr. Benn, Mr. Smith, Mr. Ballard, I believe – not Mr. Ballard. Mr. Benn, Mr. Smith, and Mr. Baker – simply lacked the authority to accept the goods for the United States.

And there was nothing in the behavior of the government [p. 9] in relation to the signature of those employees on the DD250 forms which should be held to either estop the government or to create an apparent agency in any of those employees to purport to commit the government under those circumstances, particularly in the absence of any further inspection, given their obvious job duties, which were unrelated to quality assurance inspections or the like at Anniston, and the fact that Mr. Sikes secured their signatures in the absence of any opportunity on the part of any of those people to make any kind of an inspection, let alone to certify, as their signatures would purport to do, that the containers conformed to contract requirements or contract specifications, when there's no showing or indication whatsoever that any of those people had any idea what the contract requirements or specifications were.

Those findings and conclusions I think substantially moot the third issue that I stated, namely, whether as claimed by the United States there were misrepresentations made by the plaintiff in the contract proposal regarding the origin of the containers, as well as other matters which would render the contract either void or voidable at the option of the United States.

Even so, in the event there are ever any subsequent proceedings in the case which might in some way hinge upon or revitalize that issue, it would be my finding and [p. 10] conclusions that there were no willfully material, or no material willful misrepresentations made by the plaintiff in this respect.

First of all, the question of Ms. Lyle's position with the corporate plaintiff or the experience of the corporate plaintiff – and I'm emphasizing the word "corporate" in both of those statements. The experience of the corporate plaintiff in performing earlier government contracts, it seems to me was neither willful nor material. By her testimony here, Ms. Lyle clearly established that she is the second person in command, if you will, of the corporate plaintiff in its day-to-day operations, regardless of her technical position or lack of a technical position as a corporate officer.

And with respect to the experience of the plaintiff in performing other government contracts, Mr. Sikes has credibly testified that he is and always has been the sole stockholder of the corporate plaintiff, such that it's not unreasonable in the circumstances for him to have listed

and for the government to be interested in his own personal history with respect to his prior contractual dealings with the United States.

With regard to the matter of the origin of the containers, if I now correctly understand the application to the case of the so-called Buy American Act or the Trade [p. 11] Agreements Act of 1979 – and I think I do, with the helpful arguments given this morning, now understand the operation and application of those statutes – it was important or at least material for the government to know in the proposal documents of the plaintiff whether and to what extent the goods to be delivered in compliance with the contract, should award be made to the plaintiff, were or were not of foreign origin. And, if so, what particular countries were represented or would be represented as the point of manufacture of the containers to be supplied.

However, there's also evidence that there was at least some confusion on the part of Mr. Robinette, the government's representative, with respect to discussions had with the plaintiff concerning that particular provision of the proposal documents. Also some confusion on the part of the plaintiff himself, according to his own testimony, with respect to the manner in which, quote, foreign origin, close quote, is to be determined where components, for example, may be of foreign manufacture.

But in any event, as it turns out, if my calculations are correct, only 11 of the 134 containers involved in the case, as the contract was ultimately attempted to be performed, or some 8.2 percent of the goods would have been subject to rejection or noncompliance with the Trade

Agreements Act of 1979. So that when all of those [p. 12] considerations are taken into account, in coalescence with each other, it's my firm impression and my finding of fact, as well as my conclusion of law, that there was no willful or material misrepresentation by the plaintiff. It was not willful in the sense that there was no deliberate effort to deceive, given all of the discussions that Mr. Sikes had with Mr. Robinette. And it was not material in the sense that, as it turned out, the foreign origin of the containers would have infected, for lack of a better word, the eligibility or conformity of the goods in the main, involving only 11 or 8.2 percent of the goods.

Stated another way, if only 8.2 percent of the containers were defective, it would not constitute in my view a material breach of the contract. So by analogy, if only 8.2 percent of the goods were subject to a possible material misrepresentation, it does not seem to me that in terms of the contract as a whole that that would be a material deception.

The next issue is whether or not the containers were in fact defective and, if so, to what extent. The evidence on this issue, of course, is mixed, given the inspection and approval on the part of Mr. Huffman who was, as government counsel emphasized during argument, acting in behalf of the United States, and the evidence of the government concerning the inspections that were carried out at Anniston, both by [p. 13] the government's quality assurance personnel there and by Captain Osnes, the independent expert employed by the United States to conduct an inspection.

There are some discrepancies in the government's evidence, as pointed out by plaintiff's counsel, with respect to what the findings of those various inspections were with respect to specific containers. But it's my firm impression and therefore my finding that the evidence preponderates when considered in its totality in favor of a finding that the containers were in fact defective in relation to the requirements of the contract and did not conform to the specifications of the contract.

And that is, therefore, my finding and conclusion with respect to that issue.

That brings me then to what I stated before and what I still believe to be the fifth or next issue in the case. And that is whether, as the plaintiff has clearly prayed in the issue pleadings and in the pretrial stipulation in this case – whether the plaintiff is entitled, if not to damages in the form of the full contract price for breach of contract, is nevertheless under the circumstances entitled to an alternative remedy in this case, such as an invocation of the clause or provision in the contract documents or applicable regulations by the Court terminating the contract for the convenience of the government.

[p. 14] And on that issue I am at the moment only in a position to state an impression as distinguished from a final factual determination or legal conclusion. But my impression at the moment with respect to that issue is to resolve it in favor of the plaintiff. I have found obviously that the plaintiff failed to perform the contract in accordance with its terms by delivering containers which did

not conform to contract specifications and that the government did have the right to inspect and therefore reject, as it did, at the point of destination.

But it does seem to me that the government, or its representatives in this case, are not without fault. First of all, Mr. Huffman, without any apparent inducement or persuasion by the plaintiff, as the government contends was exercised with respect to the employees at Anniston who purported to accept the goods, for example – Mr. Huffman inspected the goods at the point of origin where the plaintiff did have repair capability that had been stressed in his conversations admittedly with Mr. Robinette and approved the goods for shipment, and the plaintiff relied upon that, reasonably so, even though, to be sure, that inspection was for the benefit of the government, as counsel argues, rather than for the benefit of the plaintiff. As a strict matter of contract law, it was certainly reasonable for the plaintiff to rely upon that inspection and ship the [p. 15] goods to Anniston.

Legally, in the way I've resolved the case, he still remained at risk that the goods would be rejected upon final inspection and would, therefore, have to incur additional costs and expense of, among other things, perhaps arranging for repair at that point. But it seems to me his reliance upon Mr. Huffman's inspection was entirely reasonable under the circumstances. And there's also his testimony, which I have found to be legally inconsequential in terms of the government's right to make final inspection – but his testimony concerning his conversations with Mr. Robinette, which significantly are not disputed by Mr. Robinette, concerning his intentions in

having the containers repaired before delivery in Jacksonville, to say nothing of the fact that when the goods then arrived at Anniston, although it resulted from, in large measure, his own insistence, the fact is that government employees at the Army Depot in Anniston purported to accept those goods in behalf of the United States.

And when all of those circumstances are considered, together with the exigencies which surrounded the making of this contract in the first place – the rush of negotiations, which to some extent is relied upon by both sides, in the heat of trying to supply goods which were thought, at least by some, to be needed for the support of [p. 16] the military effort in DESERT STORM, as well as other circumstances argued by plaintiff's counsel concerning the question whether or not these containers were in fact needed in Anniston, all of these do lead me to conclude that if the Court in fact has the authority under the decisions to invoke the termination for convenience by the government clause in the contract, and if upon my further examination of that specific provision of the governing regulations and/or the contract, its terms within any measure fit the circumstances I've just described, then it would be my intention to grant that form of alternative relief.

That then involves the question of – if so, if that relief is granted, the precise elements of that remedy and whether I can proceed to fashion and impose that remedy in the form of judgment or whether, as initially suggested at least by government counsel on Friday, it would require some form of remand to the contracting officer – those are issues of fact and law that I'm unable to resolve as I sit here this morning and will, therefore, take the case

under submission for further study and review concerning those issues.

Finally, with regard to the government's entitlement, if any, to relief on the counterclaim, I will simply carry that with the case until I've resolved the last issue just stated. Because obviously the government's entitlement to [p. 17] any relief on the counterclaim will hinge, at least in part, on my resolution of the issue of the plaintiff's entitlement to any form of relief.

So I will take the case under submission to the extent that I've just stated, and I will invite the plaintiff, Mr. Tobin, within fifteen days to submit a post-trial or supplemental memo, limited to and concentrating upon the alternative remedy of termination for convenience of the government in this case. What the specific contract provisions are that govern this situation or govern, I should say, that possible remedy, and what the elements of that remedy are, what the evidence is with respect to each of those elements of relief, according to your view of the evidence, and whether the Court is empowered, once those determinations have been made, to fashion such relief in the form of a final judgment or whether some further proceedings by or before the contracting officer or some other administrative body in the Executive Branch is necessary.

And I will allow the government fifteen days after receipt of the plaintiff's memo on those points to respond or reply in like fashion. And once those memos have been received, I will then take the case under submission for further decision by the entry of either a memorandum opinion or additional findings of fact and conclusions of

law supplementing those that I have made here on the bench [p. 18] today.

Is there anything else to be taken up in the case today as far as the plaintiff is concerned, Mr. Tobin?

MR. TOBIN: No, Your Honor, there is not. Thank you.

THE COURT: For the defense?

MR. MENDELSOHN: No, Your Honor. Thank you.

THE COURT: All right. Thanks again, counsel, for your skill in presenting this matter. We'll now be in recess.

(And thus the proceeding ended at 12:17 p.m.)

[p. 19] CERTIFICATE

STATE OF FLORIDA)

)

COUNTY OF DUVAL)

I hereby certify that to the best of my knowledge and belief the foregoing transcript is a true and correct transcription of my stenographic notes and electronic tape recording taken at the time and place specified herein.

WITNESS my signature and official seal at Jacksonville, Duval County, Florida, this 23rd day of March A.D., 1993.

/s/ Mildred W. Shealy
MILDRED W. SHEALY, R.P.R.,
Official Court Reporter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WELLINGTON TRADE, INC.,

Plaintiff,

-vs-

UNITED STATES OF AMERICA

Defendant.

_____/

CASE NO.
91-784-Civ-J-10

(Filed June 11, 1993)

ORDER

This case was tried before me without a jury during the period March 15-22, 1993. At the end of the trial I announced my findings and conclusions on the record. Except for one issue, on which ruling was reserved, I essentially found for the Government. More specifically, I found that the contract, properly interpreted, allowed the Government to make a quality assurance or conformity inspection at the point of destination (Anniston Army Depot) as well as the point of origin (Jacksonville). I further found that, regardless of the Government's right of inspection, the containers were not "accepted" at Anniston despite the signatures of the workers who purported to accept them, i.e., the workers were not authorized to accept anything. I further found (contrary to the Government's assertion) that there were no *willful* misrepresentations of *material* facts by the Plaintiff in its contract proposal (regarding the national origin of the

goods or the Plaintiff's prior history in performing Government contracts). I further found that the containers were defective, did not meet the contractual specifications, and were therefore properly rejected by the United States.

It follows from those findings and conclusions that the Plaintiff is not entitled to recover the contract price under the contract. There was an alternative claim, however, that the Court should declare a constructive termination of the contract for the convenience of the Government, all in accordance with a clause to that effect in Government procurement contracts. The parties were given 30 days (15 days each) to brief this remaining issue. The briefs (Docs. 91, 93, & 96) have been filed.

The Government argues that the court lacks subject matter jurisdiction over the constructive termination claim because the Plaintiff did not submit this specific claim to the Contracting Officer. *See* 41 U.S.C. § 605(a). The requirement of a written submission is to "provide the Government with an opportunity to settle the case or otherwise avoid unnecessary litigation." *SMS Data Products Group v. United States*, 19 Cl.Ct. 612, 614 (1990). The Plaintiff's written submission (Defendant's Trial Exhibit No. 10) gave the Government such an opportunity. Furthermore, the parties have stipulated in the pretrial stipulation that the Court has admiralty jurisdiction over the case. The Court has jurisdiction over the case.

I now adopt the preliminary findings of fact and conclusions of law which I stated on the record with regard to constructive termination. This case is analogous to that of *Malone v. United States*, 849 F.2d 1441 (Fed.Cir.

1988). In *Malone* the termination for the convenience of the Government clause was invoked where the contractor reasonably relied upon a Government inspection. The court found that the Government's actions in hindering the contractor's performance materially breached the contract. *Id.* at 1445-46. Where the Government materially breaches the contract, and it could have resorted to the convenience-termination clause, damages are to be determined in accordance with that clause. *Inland Container, Inc. v. United States*, 512 F.2d 1073, 1080-82 (Ct.Cl. 1975). Accordingly, I will proceed to the "judicial inquest into damages under a set of rules written for an administrative negotiation." *Id.* at 1081.

The termination for the convenience of the Government clause provides that payment shall be made for:

> The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto . . . [and profit, unless] it appears that the Contractor would have sustained a loss on the entire contract had it been completed, [in which case] the Contracting Officer shall allow no profit under this subdivision [] and shall reduce the settlement to reflect the indicated rate of loss.

48 C.F.R. § 52.249-2.

The Court finds that the following are the reasonable costs incurred in the performance of the work:

1. $207,000.00 – purchase of containers.
2. 39,794.00 – container repairs.
3. 3,406.00 – transportation to Southeastern.
4. 30,492.00 – transportation to Anniston.

The total costs then were $280,692.00. The Plaintiff introduced no evidence as to its overhead costs. Accordingly, none will be awarded. The Government contends that the Plaintiff would have expended an additional $259,544.40 in remedial expenses had the contract been satisfactorily performed; and, therefore, based on a contract price of $489,416.00, the Plaintiff would have lost $50,820.40. In support of this contention the Government introduced at trial a report (Defendant's Exhibit 16/A) prepared by National Cargo Bureau, Inc. The report shows that the Plaintiff's remedial material expenses in completing the contract would have been $113,191.15 and that it would have expended 5,820.15 hours in additional labor costs. No evidence was submitted on the applicable wage rate and the Government has not explained how it arrived at the $259,544.40 figure. Without a proven wage rate, it is at least possible that the Plaintiff could have made a profit.[1] Accordingly, the Plaintiff would be entitled to a profit on the $280,692.00 it expended. Again, however, no evidence was introduced on what the profit should be. Therefore, none will be awarded.

The Plaintiff has also prayed for prejudgment interest, which is allowable at the rate 6.21% from 28 February

---

[1] It has been shown that the Plaintiff expended $280,692.00 in direct expenses. If it had expended an additional $113,191.15 in remedial material expenses, the subtotal would be $393,883.15. The contract price was $489,416.00. The difference between $489,416.00 and $393,883.15 is $95,532.85. Accordingly, using the 5,820.15 hour figure, if the Plaintiff's average wage rate was less than $16.41/hr, it would have made a profit.

This does not take into account any overhead expenses, since no evidence of such was introduced by either party.

1991. *See* 41 U.S.C. § 611. By compounding the prejudgment interest annually, the award is increased to $322,239.04.[2]

Because the termination for the convenience of the Government clause has been invoked, it follows that the Government's counterclaim is due to be dismissed.

Upon due consideration:

1. The Plaintiff is awarded $322,239.04 in damages, and prejudgment interest, through the invocation of the termination for the convenience of the Government clause of the contract.

2. The Plaintiff shall take nothing with regard to all of its other claims and they are hereby dismissed with prejudice.

3. The Government's counterclaim is hereby dismissed with prejudice.

4. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

---

[2] 28 Feb 91 - 28 Feb 92: 1.0621 * $280,692.00 = $298,122.97
28 Feb 92 - 27 Feb 93: 1.0621 * $298,122.97 = $316,636.40
27 Feb 93 - 11 Jun 93: 0.0621 * $316,636.40 = $19,663.12
$19,663.12/365 = $53.87/day
$53.87/day * 104 days = $5,602.64
$316,636.40 + 5,602.64 = $322,239.04

DONE AND ORDERED at Jacksonville, Florida, this 11th day of June, 1993.

/s/ Wm. Terrell Hodges
UNITED STATES
DISTRICT JUDGE

Copy to counsel of record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2936

WELLINGTON TRADE, INC., d/b/a CONTAINER-HOUSE,

Plaintiff-Counterdefendant-
Appellee, Cross-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Counterclaimant-
Appellant, Cross-Appellee.

(Filed Feb. 1, 1995)

On Appeal from the United States District
Court for the Middle District of Florida

ON PETITION FOR REHEARING

BEFORE: COX, Circuit Judge, MORGAN, Senior Circuit Judge, and COLLIER*, District Judge.

PER CURIAM:

The petition for rehearing filed by appellee Wellington Trade, Inc. is denied.

---

* Honorable Lacey A. Collier, U. S. District Judge for the Northern District of Florida, sitting by designation.

ENTERED FOR THE COURT:

/s/ Emmitt Ripley Cox
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2936

D. C. Docket No. 91-784-CIV-J-10

WELLINGTON TRADE, INC.,
d/b/a/ CONTAINERHOUSE,

Plaintiff-Counterdefendant-
Appellee, Cross-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Counterclaimant-
Appellant, Cross-Appellee.

(Filed Sept. 7, 1994)

Appeals from the United States District Court
for the Middle District of Florida

Before COX, Circuit Judge, MORGAN, Senior Circuit Judge, and COLLIER*, District Judge

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

---

* Honorable Lacey A. Collier, U. S. District Judge for the Northern District of Florida, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED in part and REVERSED in part; and that these causes be and the same are hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that each party shall bear their own costs on appeal.

Entered: September 7, 1994
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: FEB 15 1995

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

Middle DISTRICT OF Florida

Wellington Trade, Inc.

V.

USA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 91-784-Civ-J-10

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the court's order entered, June 11, 1993, plaintiff is awarded $322,239.04 in damages, and prejudgment interest, through the invocation of the termination for the convenience of the Government clause of the contract. Plaintiff shall take nothing with regard to all of its other claims and they are hereby dismissed with prejudice. The Government's counterclaim is hereby dismissed with prejudice.

June 11,1993
Date

David L. Edwards
Clerk

/s/ Marlene Kerley
(By) Deputy Clerk

Supreme Court, U.S.
FILED
NOV 14 2001
CLERK

(3)

No. 01-446

In the Supreme Court of the United States

WELLINGTON TRADE, INC., DBA CONTAINERHOUSE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
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QUESTION PRESENTED

Section 455(a) of Title 28 of the United States Code requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The question presented is whether the court of appeals abused its discretion by denying a motion to reopen a case, which had been finally disposed of almost six years earlier, based on allegations of perceived judicial partiality.

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In the Supreme Court of the United States

No. 01-446

WELLINGTON TRADE, INC., DBA CONTAINERHOUSE,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unreported. The earlier opinion of the court of appeals (Pet. Supp. App. 1-25) is unreported. The opinion of the district court (Pet. Supp. App. 26-39) and the written order of that court (Pet. Supp. App. 40-45) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1994. A petition for rehearing was denied on February 1, 1995 (Pet. Supp. App. 46). A petition for a writ of certiorari was denied on June 26, 1995.

On February 2, 2001, petitioner moved for rehearing, vacatur, and recall of the court of appeals' mandate.

That motion was denied on March 7, 2001. A petition for rehearing was denied on June 6, 2001. The instant petition for a writ of certiorari was filed on August 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 30, 1991, the federal government, acting through the Navy's Military Sealift Command, contracted with petitioner for the production of 134 cargo containers, which were to carry ammunition during Operation Desert Storm. Pet. Supp. App. 2; Pet. 6. In accordance with that contract, petitioners manufactured the containers in Jacksonville, Florida, and shipped them to Anniston, Alabama for distribution. Pet. 6. Before delivery, a government inspector in Jacksonville certified that all of the containers satisfied the contract's specifications, but when government personnel in Anniston inspected the containers, they found that the containers did not meet such specifications. Pet. 6-7. Based on the second inspection, the government refused to pay for the containers, and petitioner filed this lawsuit. Pet. 7.

Petitioner's amended complaint, filed under the Contract Disputes Act, 41 U.S.C. 601 *et seq.*, alleged breach of contract and warranty, estoppel, and termination for convenience of the government. See Pet. Supp. App. 8-9 & n.7. The United States filed a counterclaim, requesting declaratory judgment that the containers belonged to petitioner, and seeking damages for the containers' storage expenses. *Id.* at 9. After a bench trial, the district court ruled that the government was permitted to inspect the containers twice before accepting them, that the government had never legally accepted the containers, and that the containers were

defective. *Ibid.* The district court also held, however, that the government had terminated the contract for its convenience; thus, the court awarded petitioner damages and prejudgment interest totaling $322,239.04, and dismissed the government's counterclaim. *Id.* at 9-10, 50.

The United States appealed to the Eleventh Circuit, and petitioner filed a cross-appeal. Pet. Supp. App. 10. The case was heard by Circuit Judge Cox, Senior Circuit Judge Morgan, and District Judge Lacey A. Collier of the United States District Court for the Northern District of Florida, who sat by designation. *Id.* at 1. On September 7, 1994, that panel issued an unpublished, per curiam opinion affirming judgment for the respondent on the contract claim, reversing judgment for petitioner on the termination for convenience claim, and reinstating the government's counterclaim. *Id.* at 1, 25. Petitioner filed a request for rehearing, which was denied on February 1, 1995, and a petition for a writ of certiorari, which this Court denied on June 26, 1995. *Wellington Trade Inc.* v. *United States*, 515 U.S. 1159.

2. On February 2, 2001, petitioner filed a motion asking the Eleventh Circuit to rehear, vacate, and recall its 1994 mandate. Petitioner claimed that District Judge Collier should have been disqualified from hearing the case because he was a retired naval officer who, while the appeal was pending, had helped plan and had financially contributed to the commissioning of a Navy destroyer in Pensacola, Florida. Petitioner asserted that Judge Collier's participation in such activities meant that "his impartiality might reasonably be questioned" in this case, which concerned a dispute over naval trans-

port equipment.[1] In opposing petitioner's motion, the government contended that, given the nearly six years since the court of appeals' mandate, there was no basis for the extraordinary relief requested.

On March 7, 2001, Judge Cox denied petitioner's motion as untimely filed. Petitioner then filed a petition for rehearing en banc, which the court of appeals construed as a request for reconsideration and denied on June 6, 2001. Pet. App. 1-2.

ARGUMENT

The Eleventh Circuit's decision is correct and does not conflict with the decisions of this Court or of any court of appeals. In addition, none of the relevant opinions in this case has been published. Further review is accordingly unwarranted.

1. Petitioner claims that this Court should hear this case in order to resolve "a basic split among the Circuits as to whether § 455(a) has a timeliness requirement." Pet. 28. That claim is inaccurate. Following this Court's guidance in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), virtually every court of appeals, including the Eleventh Circuit, has adopted a timeliness requirement for recusal motions. *E.g.*, *United States* v. *Pearson*, 203 F.3d 1243, 1276 (10th Cir.), cert. denied, 530 U.S. 1268 (2000) ("§ 455(a) motions for recusal must be timely filed") (internal quotation mark omitted); *United States* v. *Mathison*, 157 F.3d 541, 545 (8th Cir. 1998), cert. denied, 525 U.S. 1089 (1999); *Hollywood Fantasy Corp.* v. *Gabor*, 151 F.3d 203, 216 (5th Cir. 1998); *Bivens Gardens Office*

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[1] See generally 28 U.S.C. 455(a) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

Bldg., Inc. v. *Barnett Banks of Fla., Inc.*, 140 F.3d 898, 913 (11th Cir. 1998); *United States* v. *Rogers*, 119 F.3d 1377, 1382-1383 (9th Cir. 1997); *United States* v. *Barrett*, 111 F.3d 947, 951-952 (D.C. Cir.), cert. denied, 522 U.S. 867 (1997); *United States* v. *Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995); *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 862 (6th Cir. 1992); *United States* v. *Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990) ("Timeliness is an essential element of a recusal motion.").[2]

Petitioner is correct that the courts of appeals have occasionally used different language to describe the requirement that recusal motions be made in a timely

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[2] See also *Liljeberg*, 486 U.S. at 869 (observing that "a delay of 10 months after the affirmance by the Court of Appeals would normally foreclose relief based on a violation of § 455(a)"); *United States* v. *Noah*, 130 F.3d 490, 499 n.5 (1st Cir. 1997) (collecting cases, and noting that, "in all likelihood," untimely recusal motions are "procedurally defaulted").

Petitioner incorrectly characterizes the Seventh Circuit as a "lone holdout." Pet. 28. *Edgar* v. *K.L.*, 93 F.3d 256 (1996), cert. denied, 519 U.S. 1111 (1997), indicates that the Seventh Circuit has recently put aside any doubt as to whether 28 U.S. 455(a) motions may be untimely. 93 F.3d at 257-258 ("Delay can be fatal * * * [.] Indeed, we have held, parties who know of a problem under § 455 but permit the trial to occur may not seek relief later.").

In *United States* v. *Antar*, 53 F.3d 568 (1995), the Third Circuit asserted discretion, on direct review of a criminal conviction, to review a judge's failure to recuse himself in a criminal case, where such a failure constituted plain error. See Fed. R. Crim. P. 52(b) ("Plain errors * * * may be noticed although they were not brought to the attention of the court."). *Antar*, however, did not address an attempted collateral attack on a final judgment. Nor did that decision deal with a civil case, cf. Fed. R. Civ. P. 61, where petitioner has not shown that the alleged error was "plain," see *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997), and the court of appeals properly exercised its discretion *not* to address an error that was untimely raised.

fashion. Pet. 29-30. Various courts have required such motions to be filed at the "earliest possible time after facts are discovered," at a "reasonable time in the litigation," or "in a timely fashion." *Ibid.* (collecting cases). But petitioner has failed to show that courts applying those similar locutions have, in any case or class of cases, reached inconsistent results. See, *e.g.*, *United States* v. *Anderson*, 160 F.3d 231, 234 (5th Cir. 1998) (using different expressions of the timeliness requirement interchangeably). Therefore, petitioner's claim that the courts of appeals operate under conditions of jurisprudential "discord" (Pet. 30) lacks support.

More importantly, petitioner has not demonstrated that any alleged circuit conflict could possibly affect the result in this case. Petitioner's motion to vacate was filed over six years after the Eleventh Circuit's opinion issued, and petitioner admits that it spent four years researching the issue before filing any motion with the court of appeals. Pet. 4. Petitioner's evidence of Judge Collier's alleged bias, however, comes exclusively from newspapers, Senate hearings, and other matters of public record, Pet. Lodging 1-46, and all of that evidence was available when petitioner filed its initial request for rehearing. The instant petition does not purport to explain why petitioner required more than six years to discover and assemble such publicly available evidence for presentation to the Eleventh Circuit. Without such explanation, petitioner's filing cannot be deemed timely, or excusably untimely, under the legal standards applied by *any* court of appeals. See, *e.g.*, *Pope* v. *Federal Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992) ("A party introducing a motion to recuse carries a heavy burden of proof; a judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving

otherwise."); see also *United States* v. *Sarno*, 73 F.3d 1470, 1499 & n.19 (9th Cir. 1995), cert. denied, 518 U.S. 1020 (1996) (denying a recusal motion as untimely because the movant had "not attempted to excuse his delay in filing the proper motion" and had "not alluded to any lack of knowledge that prevented him from filing the proper motion").[3]

2. Circuit conflict aside, petitioner claims that this Court should intervene because the Eleventh Circuit "disregard[ed] completely," Pet. 26, and "blatantly [ran] afoul of," Pet. 24, its own standard of reasonableness, in favor of "some sort of *per se* rule" regarding the timeliness of recusal motions, *ibid.* Petitioner's argument finds no support, however, in the Eleventh Circuit's unpublished opinion, which does not purport to apply the per se approach petitioner seeks to challenge. Moreover, it is well settled that an intra-circuit conflict generally furnishes no basis for a grant of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Petitioner provides no reason to depart from that rule here.

In the alternative, petitioner characterizes the Eleventh Circuit's decision as "extremely unclear" and as "provid[ing] no guidance whatsoever." Pet. 19. The absence of detailed explanation, however, is not a sufficient ground for finding an abuse of discretion. Cf. *In re United States*, 158 F.3d 26, 30 (1st Cir. 1998) ("[T]he

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[3] Cf. *Tezak* v. *United States*, 256 F.3d 702, 717 (7th Cir. 2001) (indicating, in applying a parallel disqualification statute, that "it remains [the movant's] burden to establish that the motion was filed at the earliest possible moment after learning of the facts showing bias. Because [movant] has failed to state with particularity when he learned of the pertinent facts prior to filing the motion, we cannot say he has met this burden.").

analysis of allegations, the balancing of policies, and the resulting decision whether to disqualify are in the first instance committed to the district judge. And, * * * in many cases, reasonable deciders may disagree * * *. The appellate court, therefore, must ask itself not whether it would have decided as did the trial court, but whether that decision cannot be defended as a rational conclusion supported by [a] reasonable reading of the record.") (internal quotation mark omitted). Moreover, because the Eleventh Circuit's decision in this case was unpublished, its allegedly "unclear" pronouncements will have no effect on other cases.

Under the circumstances of this case, the Eleventh Circuit's disposition of this case in a brief, unpublished order was entirely appropriate. Petitioner has not asserted any direct connection between Judge Collier's participation in the Navy's decision to commission a destroyer in Pensacola and his judicial participation in this case. Nor has petitioner explained the fact that his motion was filed more than six years after the disputed Eleventh Circuit decision issued. In light of such facts, petitioner cannot identify *any* legal test or appropriate balancing of circumstances that would require the Eleventh Circuit to reach the merits of his untimely motion for the extraordinary remedy of vacatur. Cf. *Liljeberg*, 486 U.S. at 862 ("There need not be a draconian remedy for every violation of § 455(a)."). By summarily denying petitioner's motion, the Eleventh Circuit preserved the finality of judicial resources already invested in the case, without expending further such resources reciting factors and circumstances that were plain from the record. Petitioner has not shown that the Eleventh Circuit abused its discretion in making that choice; much less has petitioner shown that

any such fact-bound error warrants this Court's intervention.

3. Finally, petitioner requests that this Court hear this case on the ground that there "is a dearth of case law giving specific guidance as to the disqualification of appellate judges." Pet. 20-22. Petitioner does not explain, however, why it is important that most cases dealing with judicial disqualification concern district judges, rather than appellate judges. The statutory text establishes a unified standard of recusal for "[a]ny justice, judge, or magistrate of the United States," 28 U.S.C. 455(a), and petitioner offers neither authority nor justification for treating court of appeals judges differently from other types of judges. Nor is it clear that the absence of reported decisions counsels in favor, rather than against, a grant of certiorari in this case. Generally, this Court grants certiorari to resolve important and recurring issues on which the courts of appeals have divided, cf. Sup. Ct. R. 10(a), not issues that the courts of appeals have neglected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2001

Supreme Court, U.S.
FILED
NOV 21 2001
OFFICE OF THE CLERK

No. 01-446

In The

Supreme Court of the United States

WELLINGTON TRADE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 1974, Congress enacted the modern version of 28 U.S.C. § 455(a), to broaden and clarify the grounds for disqualification of federal judges at all levels of the judiciary. Since the modern § 455(a) was enacted, several key questions have remained unresolved.

The Petition in this case raises the following single question:

1. When a panel of a federal Circuit Court of Appeals reverses a judgment on which a party prevailed, and that party learns after reversal that the impartiality of one of the panelists might reasonably be questioned and thereafter moves for *vacatur* of the panel's decision, may the Court of Appeals properly deny a motion to recall the mandate and for *vacatur* on "timeliness" grounds?

PARTIES AND RULE 29.6 STATEMENT

The caption reflects the parties to this proceeding. Wellington Trade, Inc., d/b/a "Containerhouse," was the plaintiff in the United States District Court for the Middle District of Florida and the appellee/cross-appellant in the original proceedings in the Eleventh Circuit. The United States was the defendant in the District Court and the appellant/cross-appellee in the original proceedings in the Eleventh Circuit.

After Wellington Trade learned of the circumstances supporting the disqualification of an Eleventh Circuit judge who sat on the panel in this case, Wellington Trade became the petitioner moving for *vacatur* in the Eleventh Circuit and the United States became the respondent.

Pursuant to Supreme Court Rule 29.6, Wellington Trade certifies that the statement included in its Petition for Writ of *Certiorari* remains unchanged.

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ARGUMENT

I. THE GOVERNMENT MISSTATES THE QUESTIONS PRESENTED.

Any federal judge, even one sitting in a case involving an agency with the power to affect the judge's personal interest in bringing notoriety and prosperity to his hometown:

> ...shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a). Moreover, a judge must be vigilant in his subjective deliberations, for *any* federal judge shall also disqualify himself where:

> He has a personal bias or prejudice concerning a party, [or]
>
> . . .
>
> He knows that he...has...*any other* interest that *could* be substantially affected by the outcome of the proceeding.

28 U.S.C. §§ 455(b)(1), (b)(4) (emphasis supplied).

The parties do not disagree on this principle. *See, e.g.* Brief for the United States in Opposition ("Opp.") at p. 4, n. 1, *citing* 28 U.S.C. § 455(a). Rather,

the Petitioner and the United States disagree as to where the Court's focus should properly lie.

The government, in a totally new twist, ignores the issues presented by Judge Collier's failure to follow § 455, and states the question simply as whether the Eleventh Circuit "abused its discretion" in this single case. *See* Opp., p. I. The issue is not quite that simple, however. The Eleventh Circuit's summary ratification of Judge Collier's failure in this case is indicative of the way litigants, and more importantly the judicial system, are routinely denied by the Courts of Appeals the protections Congress intended when it crafted 28 U.S.C. § 455. *That* is an issue which potentially reaches all cases, which is why the Court should grant *certiorari.*

A. The Government Misstates The Issues.

The United States misses the real questions presented in this case by focusing solely on whether there is a split among the circuits with respect to the Petitioner's burden under § 455. To that end, the government spends almost its entire argument questioning whether Petitioner satisfied the varying standards courts sometimes apply, without addressing the more fundamental question of whether Judge

Collier's alleged disqualification should have been summarily overlooked by the Eleventh Circuit.[1/]

Significantly, whether Petitioner fulfilled some amorphous burden or passed a particular test is not at issue, for the Eleventh Circuit never indicated any test was applicable – much less demonstrably applied one – in this case. Instead, after Petitioner went to great lengths both to pull together public record information (which Petitioner was not even fully aware existed and was still researching until shortly before filing its motion below, *see* Pet., pp. 9-13) and to find an attorney willing to challenge the federal appellate judiciary, the Eleventh Circuit simply stated, in one word, that Wellington Trade's motion was "untimely."

The key question this case presents is whether the Courts of Appeals may continue to turn litigants away without applying any visible test whatsoever, a practice that frustrates the purposes of 28 U.S.C. § 455 and makes it nearly impossible for a litigant in Petitioner's situation even to find counsel, *see* Pet. at 21.

[1/] Judge Collier was, and remains, a judge of the United States District Court for the Northern District of Florida, who sat by designation on the original Eleventh Circuit panel in this case. *See* Petition for Writ of *Certiorari* ("Pet."), p. 8. *See also* Pet., pp. 9-13 (Judge Collier's interests subordinate to the Navy's).

Judges sitting on a Court of Appeals panel are almost *never* challenged under 28 U.S.C. § 455 by attorneys for the parties. Indeed, a far-disproportionate number of reported opinions involve the disqualification of district judges, to the near exclusion of reported opinions concerning judges at the federal appellate level. *See, e.g.* Pet., pp. 19-23.

As Petitioner notes, the imbalance between cases involving district judges and cases involving appellate judges is startling. Two levels below this Court, in the district courts, judges have approximately five-hundred published decisions – covering the wide range of possible situations unique to the trial courts – to help guide their decisions. While there are approximately seventy-seven published opinions where a Court of Appeals found a district judge to be disqualified, there are *zero* published opinions where an appellate judge (or judge sitting by designation at the appellate level) was disqualified.[2/] Without exception, the effect has

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[2/] The disparity between district and appellate judge disqualification suggest three possibilities: (1) appellate judges have been perfect in their decisions to recuse or not recuse themselves; or (2) litigants simply have not challenged their failure to recuse; or (3) the judicial system – which 28 U.S.C. § 455 was designed to protect – is just not working when it comes to the disqualification of appellate judges. Of those three possibilities, the first is simply implausible, while the latter two both counsel in favor of Petitioner's arguments..

been that, at the appellate level, 28 U.S.C. § 455 has become a statute without effective judicial review.

The consequential effect on the rule of law, on the rights of litigants to an unbiased tribunal, and on the need for a system where the tribunal appears unbiased is absolutely chilling. Indicative of that chill is the fact that in the approximately three dozen instances where the Courts of Appeals have even addressed disqualification at the appellate level, only a handful of the parties raising the issue were represented by a "regular" member of the bar. As Petitioner has set forth, in nearly ninety-percent of such cases, the issue was either raised, *sua sponte*, by the court, or by litigants acting *pro se* (or represented by a *pro bono* legal "project" or group). *See* Pet. at 21.

The cause for this statistic is readily apparent. As this Court has recognized, a motion to recuse even a trial judge is "inherently offensive" – and federal courts have taken offense at such filings, even when appropriate and when counsel is duty-bound to so move. *See, e.g. United States v. Cooper*, 872 F.2d 1, 3-4 (1st Cir. 1989), *citing Holt v. Virginia*, 381 U.S. 131, 137 (1965). The reason for this inherent offensiveness is obvious, for a motion to recuse a trial judge

> requires the moving party to allege and substantiate bias and prejudice – traits contrary to the impartiality expected from a mortal cloaked in a judicial robe.

United States v. Cooper, 872 F.2d at 4.

If judges of the Courts of Appeals are able to recognize that the issue of disqualification represents an affront to a *district* judge in question, Petitioner asks this Court to consider how threatening the issue must appear to most attorneys asked by a client or potential client to raise the issue with respect to an *appellate* judge. Between this implicitly intimidating situation and the fact that there is not one published case where this Court or any of the Courts of Appeals have ever upheld a litigant's motion to disqualify an appellate judge, it is not surprising that the vast majority of these few litigants who do raise the issue are not represented by regular counsel.

Moreover, the total absence of published case law upholding the disqualification of federal appellate judges serves as a strong deterrent – an almost prohibitive object lesson – for attorneys who might otherwise be willing to move to disqualify an appellate judge who (in the litigant's view) violated 28 U.S.C. § 455.

Against this backdrop, with its dearth of case law discussing federal appellate disqualification, unique legal questions arise. For example, as Petitioner notes, there is the potential "harmless error" issue associated with having only one panelist disqualified, as occurred in this case. *See, e.g.* Pet., pp. 21-22; Lodging, pp. 66-68. Likewise, if Judge Collier were found to have been

disqualified, the appropriate remedy in this case is unclear. *See, e.g.* Pet., p. 22; Lodging, pp. 71-74.

Without extant guidance from this Court, in particular, or from the Courts of Appeals (which have uniformly avoided these issues), the total absence of case law upholding disqualification at the federal appellate level will continue to serve as an insurmountable barrier to litigants seeking an unbiased judicial process. *See, e.g.* Richard Flamm, Judicial Disqualification, pp. 848-850 (Little, Brown: 1996).

At the end of its Opposition, almost as an afterthought, the government makes a salient point:

> Generally, this Court grants certiorari to resolve important and recurring issues on which the courts of appeals have divided, cf. Sup. Ct. R. 10(a), not *issues that the courts of appeals have neglected.*

Opp., p. 9 (emphasis supplied).

In more than seventy-seven years of active litigation under 28 U.S.C. § 455 or its predecessor, the Courts of Appeals have neglected to publish even one opinion upholding a litigant's challenge to an appellate judge. That neglect, combined with the unique questions presented by federal appellate disqualification that Petitioner has pointed out in this case, makes the issues presented here "important." Just because the

Courts of Appeals hide the problems by issuing summary, unpublished opinions – like the Eleventh Circuit did in this case – is no reason to believe these issues are not "recurring."

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* in this case.

Respectfully submitted,

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(5)

No. 01-446

IN THE
SUPREME COURT OF THE UNITED STATES

WELLINGTON TRADE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* RICHARD E. FLAMM IN SUPPORT OF PETITION FOR *CERTIORARI*

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Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* OUT OF TIME

Pursuant to Sup. Ct. Rules 37.2(a) and 37.2(b), the prospective *amicus curiae*, Richard E. Flamm, Esq., hereby respectfully moves for leave to file the following Brief of *Amicus Curiae*.

The United States' Brief in Opposition, which was originally due in October of 2001, was filed with leave of the Court on November 14, 2001. As such, the Brief of *Amicus Curiae* is untimely under Sup. Ct. Rule 37.2(a).

Petitioner, Wellington Trade, Inc., has consented to the filing of this Brief, but the Respondent, United States, has withheld its consent and thereby opposes this filing. Accordingly, leave of the Court is required under Sup. Ct. Rule 37.2(b). The reasons for the United States' withholding consent have not been fully communicated by the United States, though counsel did communicate to counsel for Petitioner the fact that the United States would not give its consent.

As set forth in the Brief of *Amicus Curiae*, the movant is a leading authority and author of the nation's leading treatise on judicial disqualification. The movant was unable to undertake this project at a time before the United States' Brief in Opposition was filed. However, because the movant presents an entirely

different view of the questions this case presents than do either the Petitioner or the government, the movant believes that his brief will likely aid the Court's decision whether to grant *certiorari*.

Respectfully submitted,

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Amicus Curiae

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INTERESTS OF THE *AMICUS CURIAE*

I am an attorney at law duly licensed to practice before this Court, as well as the state courts of California and many federal district courts and appellate courts of appeals.[1/]

I have practiced law for more than 20 years. For more than 6 years I have confined my practice to advising, and sometimes representing, clients on matters of legal and judicial ethics. I have written numerous articles, and given frequent lectures on these topics. I am also the author of a nationwide treatise – *Judicial Disqualification: Recusal and Disqualification of Judges* – which was first published by Little, Brown & Company of Boston in 1996. My treatise examines in detail the principles which have been espoused by the nation's courts in deciding judicial disqualification motions and appeals.

I have taught the subject of Professional Responsibility at Boalt Hall Law School (The University of California at Berkeley), and will be

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1/ Pursuant to Sup. Ct. Rule 37.6, *Amicus* certifies that this brief was authored entirely by the *Amicus Curiae*. Petitioner, Wellington Trade, Inc., made a partial monetary contribution to the preparation of the brief. Pursuant to Rule 37.3 of the Rules of the Court, counsel for Wellington Trade, Inc. sought the United States' consent to the filing of this brief, but the United States withheld its consent.

teaching the course again this Spring at Golden Gate University School of Law. On account of my academic and legal work in this field, I am very interested and concerned about the status and development of the law of judicial disqualification.

I write to provide this Court with my opinion why the questions this case presents are important ones the Court should resolve.

SUMMARY OF ARGUMENT

In denying Petitioner's motion for *vacatur* as "untimely filed," the Eleventh Circuit neglected to say whether it had reached this conclusion because it had found that Petitioner had impliedly waived its right to seek Judge Collier's disqualification, or if it concluded that such a result was warranted, on "timeliness" grounds, even if there was no such waiver. Assuming, *arguendo*, that the court held that Petitioner impliedly waived the right to seek disqualification, the court failed to specify whether it believed that, to be timely, Petitioner would have had to have raised its objection prior to oral argument, prior to the court's decision, or at some indeterminate later point in time.

In my opinion, this Court should grant the Petition and take review to decide three questions. First, is there a requirement that a party who discovers that a federal circuit judge is subject to disqualification pursuant to 28 U.S.C. Section 455 must move to

disqualify the judge prior to oral argument or the issuance of the decision on appeal – even if the party is unaware of the basis for disqualification at that time? If there is no such requirement, may the court deny a motion to vacate the decision of the appellate panel which the allegedly disqualified judge participated in, on "untimeliness" grounds, in the absence of any finding that any compelling reason for such a ruling exists? Finally, must a court which decides to overrule an objection, pursuant to Section 455, issue a statement explaining the reasons for its decision and the facts on which it was based?

ARGUMENT

A. Standard of Review.

This Court has not yet specifically addressed the applicable standard of review in the context of a motion for *vacatur* brought pursuant to Section 455. Nevertheless, the government asserts – without benefit of support – that the appropriate standard in this case is "abuse of discretion." Government Opposition ("Oppo."), p. 1. I do not believe that this is so.

It seems to me that, regardless of whose characterization of the questions presented by this appeal is more accurate, that question is purely one of law. This Court has made it clear that pure questions of law – such as those presented by this Petition – are subject to *de novo* review. *Elder v. Holloway*, 510 U.S.

510, 516 (1994). In the analogous context of a Section 144 motion, the Seventh Circuit Court of Appeals held that the question of whether an affidavit of disqualification is untimely "is a question of law, for which the appropriate standard of review is *de novo*." *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), *cert. denied sub nom. DiSalvo v. United States*, 475 U.S. 1095 (1985).

I do not see that the Petition raises any question of fact. But even if it did, this Court has indicated that it is committed to the *de novo* standard of review for mixed questions of law and fact as well. *Brecht v. Abrahamson*, 507 U.S. 619, 642 (1993) (Stevens, J., concurring). Likewise, the Fourth Circuit Court of Appeals has held that a mixed question of law and fact to pertaining to an issue of judicial bias is subject to *de novo* review. *Nakell v. Attorney General*, 15 F.3d 319, 324 (4th Cir. 1994).

Since the applicable standard of review is *de novo* – not abuse of discretion – this Court owes no deference to the Eleventh Circuit's decision to deny Petitioner's Motion to Vacate. On the contrary, this Court is free to substitute its judgment for that of the lower court, and should do so if it believes the lower court was wrong.

B. Confusion about the Relationship Between an Untimely Filing and Implied Waiver.

It would appear to be clear beyond peradventure (and the government in this case does not dispute) that a party has a constitutional right to have his cause heard by an unbiased tribunal. See e.g., *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). That this is a fundamental right can hardly be gainsaid. In fact, of all the rights a party is entitled to, none are more fundamental than this.

Of course, even rights of a constitutional dimension are not absolute. They may be overridden when necessary, to protect a countervailing public interest, or when another compelling reason exists. Likewise, such rights may be expressly waived. Here, however, no compelling reason for overthrowing Petitioner's right to an impartial tribunal has been established – or even identified; and Petitioner did not expressly waive the right to have its cause heard by an unbiased tribunal. Since Petitioner did not expressly waive the right to an unbiased tribunal, the Eleventh Circuit must have either concluded that Petitioner impliedly waived that right, or that there are situations in which a party can be deprived of that right without waiving it.

At first blush, precisely what the Eleventh Circuit meant by its holding that Petitioner's motion to

vacate was "untimely filed" is not entirely clear. In some jurisdictions, the terms "untimely" and "waiver" are analytically linked in such a way that, should the court find that a party has not exercised a right in a timely manner, it will ineluctably conclude that the party has waived its right to seek relief. See, e.g., *Kulas v. Flores*, 255 F.3d 780 (9th Cir. 2001) (stating that a party who fails to file a timely jury demand waives his right to trial by jury).

In the recusal context, a host of courts have conflated the "timeliness" and "waiver" concepts; holding or implying that a party who does not raise an issue of disqualification, pursuant to Section 455, promptly upon learning the facts relevant to disqualification "waives" its right to complain. The Eleventh Circuit Court of Appeals is one of the courts which has so held. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) ("a challenger must object to a biased judge in a motion to recuse before trial or as soon as the alleged bias is discovered; again, the penalty for failing timely to object is waiver of the objection").

Other courts – including panels of the Third, Seventh and Ninth Circuit Courts of Appeals – have reached similar conclusions. *See Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 871 (9th Cir. 1991) ("even if the trial judge did abuse his discretion, Datagate waived its right to have the judgment vacated by failing to move for disqualification in a timely fashion"); *United States v. Nobel*, 696 F.2d 231, 237

(3d Cir. 1982) (finding waiver under § 455(e) based on a party's failure to make a timely objection once the basis for disqualification was fully disclosed), *cert. denied*, 462 U.S. 1118 (1983). *Cf. Schurz Communs. v. FCC*, 982 F.2d 1057, 1060 (7th Cir. 1992) (Posner, J.) ("The failure to bring potentially dispositive authority to my attention – especially Barnes, the circuit's latest word on the issue of timeliness – could be thought to waive the issue").

But not every court has perceived that the concepts of "waiver" and "untimeliness" are inextricably linked. This past year, the Second Circuit Court of Appeals noted, in *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000), that the terms waiver and untimeliness "present a potentially confusing issue of terminology." The court pointed out that, while "the cases do not always clearly distinguish between them, waiver and untimeliness are distinct issues":

> Waiver is a renunciation – whether expressly through words or implicitly through behavior – of the right to seek recusal. Untimeliness, on the other hand, is merely a failure to seek recusal when it should first have been sought, that is, as soon as the facts on which it is premised are known to the parties. The confusion arises because untimeliness in making a motion for recusal can sometimes constitute the basis for finding an implied

> waiver. But the distinction is a critical one, because while waiver - whether express or implied - will preclude appellate courts from entertaining a recusal claim, untimeliness need not do so. *See United States v. Olano*, 507 U.S. 725 (1993) (distinguishing between "forfeiture" of a claim, which results from failure to assert the claim in a timely way, and which does not prevent an appellate court from correcting a plain error by the trial court, and "waiver," which is the "intentional relinquishment or abandonment of a known right," and which permanently extinguishes the right to raise a claim).

See also United States v. York, 888 F.2d 1050, 1055 (5th Cir. 1989). *Cf. In re Kansas Pub. Emples. Retirement Sys.*, 85 F.3d 1353, 1363 ("While it is true that a § 455(b)(1) objection cannot be waived, it is still subject to the timeliness requirement of our cases"). *But see Polizzi v. United States*, 926 F.2d 1311, 1320 (2d Cir. 1991) ("We agree with the Government that Polizzi waived the claim that Judge Leval should have recused himself when he failed to timely move for such recusal pursuant to 28 U.S.C. § 144 or 28 U.S.C. § 455").

From the Eleventh Circuit's concise ruling, it is impossible to know whether it concluded that Petitioner

impliedly waived the right to complain of Judge Collier's qualification to sit on the appeal, or that Petitioner's alleged failure to seek relief in a "timely" fashion warranted the court in denying further review even in the absence of such a waiver. However, in light of that Circuit's reasoning in *Pate*, I assume that the court in this case (impliedly) held that Petitioner impliedly waived its right to seek Judge Collier's disqualification by not seeking such relief in a more expeditious fashion.

This assumption does not resolve the confusion generated by the court's decision, however, because even assuming that the court found that Petitioner had impliedly waived its right to raise the disqualification issue – and not merely relied on its subjective belief that the motion to vacate was, in some manner, untimely – it is unclear whether the court arrived at this conclusion because it thought Petitioner should have raised this issue before oral argument on the appeal, before the appellate court issued its judgment in the case, or at some indeterminate point after the court's judgment became final.

In some cases, the failure to specify the precise grounds on which the court reached its conclusion could be significant; and, as discussed below, I believe that this Court should accept review if – for no other reason – to provide guidance to the lower courts on the vital importance of issuing specific findings of fact and conclusions of law when denying motions which raise

non-frivolous questions as the impartiality of a federal judge. In this case, however, I am of the impression that the precise point in time at which the court concluded Petitioner's motion should have been brought is of no practical significance because, under each of these three scenarios, the court's decision is neither supported by the record nor by the rationale of the "implied waiver" rule.

C. The Motion Was Not Untimely Merely Because It Was Not Made Before Oral Argument.

Petitioner appears to believe that the court decided that Petitioner's motion was untimely because it was not brought before the appellate hearing. Petition 16-17. It is not entirely clear that this is the case; but, assuming it is, I believe Petitioner has good cause to complain.

Rules and regulations do not exist in the abstract – they are adopted for a reason. The requirement that an objection to a federal judge pursuant to Section 455 be made in a "timely" manner is no different. Of course, not every jurisdiction has agreed that there even is such a requirement, but those that have are fairly consistent in explaining the rationale for it: the timeliness rule was designed primarily to discourage parties from holding back on filing a Section 455 motion for tactical purposes, such as judge-shopping or delay. *See, e.g., In re IBM Corp.*, 45 F.3d 641, 643 (2d

Cir. 1995) ("a prompt application avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters"); *In re Anwiler*, 958 F.2d 925 (9th Cir. 1992).

For the purposes of this brief, I do not quarrel with the view that, in a situation where a party alleges that a federal district court judge is biased or appears to be so, a requirement that the moving party must raise this issue in a "timely" fashion – which is usually interpreted to mean within a reasonable time after learning the grounds on which the disqualification challenge is made – may sometimes make sense. But in proceedings before the district court, parties generally learn who the judge will be long before a dispositive hearing or trial takes place. As a consequence, it is possible that a party could learn of grounds for judicial disqualification, but purposefully delay bringing a section 455 challenge, in order to "sample the temper of the court" before deciding whether to seek to get rid of him. *See United States v. Alabama*, 828 F.2d 1532 (5th Cir. 1987), *cert. denied sub nom. Board of Trustees v. Auburn University*, 487 U.S. 1210 (1988).

The same is true of appeals and petitions brought to this Court. Parties always know who is sitting on this Court well in advance of oral argument. If there was no requirement that a section 455 challenge be brought in a "timely" fashion, it is not unforeseeable that a party might hold back on making such a challenge until it had a chance to test the Court's reaction to its oral

argument. It is far from clear, however, that the same situation exists in situations where an appeal has been made to a federal circuit court.

The government says that it does not see the "justification for treating court of appeals judges differently from other types of judges" – or "why it is important that most cases dealing with judicial disqualification concern district judges, rather than appellate judges." Oppo., p. 9. The fact is, however, that the situation which exists when a federal appellate panel convenes to hear oral argument on an appeal is markedly different from the two situations, described above, in which the other two tiers of the federal judiciary are called upon to decide a dispute.

The parties to a federal appeal typically receive extremely short notice of the composition of the appellate panel that will hear their appeal.[2/] In fact, as Judge Posner observed in *Schurz Communs. v. FCC*, 982 F.2d 1057 (7th Cir. 1992), in some jurisdictions the parties may not learn who will hear their cause until the very day on which they appear for oral argument. *Id.* at 1060. As a consequence, unless a party or its counsel happens to be in possession of information which makes it aware of a potentially disqualifying

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2/ This is a case in point. Petitioner did not learn of the composition of the appellate panel in this case until April 28, 1994 – three months *after* it filed its Answer Brief and Initial Brief on Cross Appeal, and only 26 days before oral argument.

circumstance on that day, it is highly unlikely to discover that disqualifying circumstance before oral argument in the case takes place.[3/]

Since, as a practical matter, the parties to a federal appeal will rarely be aware of the grounds for disqualifying a federal circuit court judge before oral argument, the possibility that they will purposefully withhold a challenge to an appellate judge's qualification to act in order to "sample the court's temper" is virtually non-existent. In my opinion, therefore, the primary rationale for the timeliness requirement – the concern about a challenge being withheld for tactical reasons – has no applicability in this situation.

For two centuries this honorable Court has recognized that when the reason for a rule does not apply to a particular state of facts, neither should the rule. *See Green v. Liter*, 12 U.S. 229 (1814) (Story, J.) ("The reason of the rule could not apply to such a state of things; and *cessante ratione, cessat ipsa lex*"). *See*

[3/] It might be argued that, because there are a finite number of judges who sit in any one circuit, parties could investigate the possibility that any of them would be disqualified from presiding over an appeal. For all but the most "well heeled" parties this would seem to be unrealistic, however; and, in any event, parties would have no reason to investigate judges who, like the challenged judge in this case, were assigned to the sit on the court by designation.

also Zadvydas v. Davis, 533 U.S. 678 (2001), citing 1 E. Coke, Institutes *70b (the rationale of a legal rule no longer being applicable, that rule itself no longer applies); *United States v. Applied Pharm. Consultants*, Inc., 182 F.3d 603 (8th Cir. 1999) ("[H]ere, th[e] reason does not apply, and therefore the rule should not apply").

D. The Motion Was Not Untimely Because it Was Not Made Before the Eleventh Circuit Reversed Petitioner's Judgment.

Assuming, as I do, that a party who was unaware of the grounds for objecting to a federal appeals judge at the time of oral argument cannot realistically be found to have impliedly waived the right to challenge the judge's qualification to participate in the appellate panel by not objecting prior to that time, the next question is whether the Eleventh Circuit could have properly concluded that Petitioner impliedly waived that right by not raising the issue before the Court issued its judgment.

It is possible that a party could learn of the grounds for an appellate judge's disqualification after oral argument, but before a judgment has been issued. In such a situation, a finding that the party impliedly waived its right to seek relief might conceivably be justified; if not necessarily on "judge-shopping" grounds, perhaps on the basis of concerns about judicial economy. *See e.g. Schurz, supra.* at p. 1060 ("[moving

parties] could have filed a motion to disqualify me after the argument but before the decision. If they improbably feared that the case would be decided before they could draft and file the motion, they could had asked the court to delay its decision. In fact the court took more than a month to decide the case and during this period no motion to disqualify was filed. The movants followed none of the courses of action that was open to them. They waited until two weeks after the decision was handed down before filing the motion to disqualify").

As a host of courts have recognized, however – including the Eleventh Circuit Court of Appeals in *Hicks v. Talbott Recovery Sys.*, 196 F.3d 1226 (11th Cir. 1999) – waiver is defined as the intentional and voluntary relinquishment of a known right. It is one thing to say that a party may be found to have impliedly waived its right to object to a judge's qualification to sit by not moving promptly after learning of the facts warranting disqualification, and quite another to say that a party may waive this right by not objecting by a particular point in a proceeding – whether it was reasonably unaware of the grounds for disqualification or not.

Here the Eleventh Circuit did not find, expressly or impliedly, that Petitioner learned of the basis for its Section 455 challenge after oral argument was completed, but before the Eleventh Circuit rendered its decision. Perhaps more to the point, there appears to be

no record evidence which would have warranted the court in making such a finding. It appears, therefore, that if the court properly determined that Petitioner's motion was untimely, this must be because the court impliedly found that Petitioner did not move fast enough to see that the court's judgment was set aside after judgment was entered.

E. The Motion Was Not Untimely Merely Because it Was Not Made Earlier.

At first blush, the Eleventh Circuit's implicit finding – that Petitioner waited too long after issuance of judgment to seek relief – might not seem unreasonable. After all, as the government points out in its Opposition, it appeared that the case "had been finally disposed of almost six years earlier." Oppo. p. 1. As previously noted, however, a party's right to have its cause heard by an impartial tribunal raises constitutional concerns. Although such a right may be subject to override for compelling reasons, an analysis of the record makes it is difficult to fathom a compelling basis for denying Petitioner of that right here.

The primary rationale for an implied waiver rule is the same as that which justifies a timeliness requirement – to nullify the rewards of "sand-bagging" and to prevent parties from seeking judicial disqualification after obtaining an insight into their views as to the merits of the case. Clearly, such a

tactical motivation cannot possibly be suspect after the point in time at which the court has rendered its judgment against that party. Likewise, while delay is sometimes a strategic consideration in withholding such a challenge, it is difficult to conceive of any tactical reason a party whose judgment has been reversed by the Court of Appeals could possibly have for delaying seeking relief from that judgment. Consequently, if there is a rationale for a timeliness/waiver rule in a situation where a party discovers the grounds for disqualification post-judgment, it must be something else.

As previously noted, courts have suggested one possible alternative rationale for a timeliness/waiver rule: judicial economy. *See, e.g., In re National Union Fire Ins. Co.*, 839 F.2d 1226 (7th Cir. 1988) ("Counsel who perceive a problem under § 455(a) must not tarry, for delay imposes heavy costs on other litigants and the judicial system"). In the usual scenario – where the moving party raises the disqualification issues at some point before a final judgment has been rendered – such a concern may well be sound. Once an appellate judgment has been rendered, however, it is somewhat difficult to see how the interests of judicial economy are fostered by insisting that a party who seeks to have that judgment set aside must move for relief by any particular moment in time.

A possible concern which might make sense in the post-judgment scenario (although not one typically

cited by courts which have invoked "implied waiver" in support of a decision to deny consideration of a claim of judicial bias) concerns the desire of courts to insure the finality of their judgments. In my opinion, such a concern might well be legitimate in a situation where reopening the matter would unseat the prevailing party's reasonable assurance that the matter has been laid to rest, once and for all; or where allowing the recusal request would require a new trial in a case where memories may have faded or critical documents have been lost. The concern, in either event, would be that the moving party's alleged delay in raising the recusal issue could result in prejudice to the prevailing party.

In this case, however, such a concern has no applicability. The prevailing party was the government – not an individual – and the government's interest in avoiding having the court re-examine the fairness of the forum which decided its dispute with Petitioner cannot, in my opinion, trump the Petitioner's right to insure that the judgment against it was fair. Perhaps more fundamentally, what is involved is not a potential new trial, but rather an appeal involving an interpretation of the law governing a simple contract dispute. Thus, this Court does not need to be concerned about witnesses having died, or memories have been lost. In fact, for all intents and purposes, the Court could decide the issues raised by Petitioner's appeal just as easily in 2012, as in 2002.

F. Lower Courts Need to Be Advised That They Must Issue Findings of Fact and Conclusions of Law in Section 455 Proceedings.

One final concern, in my view, augurs in favor of granting this Petition. Two decades ago the Eleventh Circuit quoted *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974), for the proposition that "[T]he protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system")." *Huff v. Standard Life Ins. Co.*, 683 F.2d 1363, 1370 (11th Cir. 1982). Nevertheless, here, the court summarily disposed of Petitioner's Motion to Vacate – which raised the spectacle of such an appearance of bias – with 13 letters: "untimely filed." In my opinion, in a case like this, where an appellate court has been asked to rule on a non-frivolous motion challenging a tribunal's partiality, it is imperative that a higher court have a record before it that will permit meaningful review, should such review of the court's disqualification order (or, as here, denial) be sought.

In the analogous context of motions to disqualify counsel, many courts – including the Tenth Circuit Court of Appeals – have made it clear that, when ruling on a motion for disqualification, the lower court must make specific factual findings and legal conclusions. *See , e.g., United States v. Collins*, 920 F.2d 619, 628 (10th Cir. 1990) ("When a district court disqualifies defendant's counsel of choice, it must make findings on

the record stating the rationale for its action"). In my opinion, it would not be unreasonable to ask that district and appellate courts which deny non-frivolous challenges to a tribunal's impartiality be required to do the same thing.

CONCLUSION

The Petitioner has the constitutional right to be assured that the appellate court's decision reversing the district court's judgment in its favor was the product of unbiased and impartial consideration, and the government has failed to show that any compelling reason warrants overriding that right in this case. I believe this Court should take review to redress this injustice, to clarify the law on "timeliness" and "implied waiver" of the right to object to a judge pursuant to Section 455, and to provide guidance to the lower courts on the need to issue findings of fact and conclusions of law in Section 455 proceedings.

Respectfully submitted,

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